

## **FRANCIS G. MORRISEY, O.M.I.**

### ***Curriculum vitae***

#### **OBLATE NUMBER**

10183

#### **BIRTH**

13 February 1936      Charlottetown, Prince Edward Island

#### **PERPETUAL PROFESSION**

8 September 1959      Ottawa, Ontario

#### **PRESBYTERAL ORDINATION**

23 September 1961      Ottawa, Ontario

#### **ACADEMIC DEGREES**

1955 Bachelor of Philosophy, University of Ottawa  
1955 Bachelor of Arts, University of Ottawa  
1957 Licentiate in Philosophy, University of Ottawa  
1960 Bachelor in Theology, University of Ottawa  
1962 Licentiate in Theology, University of Ottawa  
1963 Master of Arts (Religious Education), University of Ottawa  
1965 Bachelor of Canon Law, University of Ottawa  
1966 Licentiate in Canon Law, Saint Paul University  
1966 Master of Canon Law, University of Ottawa  
1972 Doctorate in Canon Law, Saint Paul University  
1972 Doctor of Philosophy (Canon Law), University of Ottawa  
Doctoral dissertation:  
*The Juridical Status of the Catholic Church in Canada, 1534-1840*  
(*A Study in Church-State Relationships in Canada*)

## UNIVERSITY POSITIONS

- 1963-1965 Secretary for Ecclesiastical Faculties, University of Ottawa
- 1965-1971 Registrar, Saint Paul University
- 1972-1984 Dean, Faculty of Canon Law, Saint Paul University
- 1984-2001 Titular (Full) Professor, Faculty of Canon Law, Saint Paul University
- 2001-2020 Professor *Emeritus*

## EDITORIAL POSITIONS

- Founder of *Studia Canonica*. *A Canadian Canon Law Review*, 1967
- Editor, 1967-1994
- Member of the editorial advisory board
- Concilium* (Nijmegen, Holland)
- Revista española de derecho canónico* (Salamanca, Spain)

## ACADEMIC SOCIETY POSITIONS

- Canadian Canon Law Society
- Secretary-Treasurer, 1966-1973
- President, 1973-1975
- Past President, 1975-1977
- Executive Secretary, 1977-1983
- Consociatio Internationalis Studio Iuris Canonici Promovendo
- Board of Directors, 1980-1995

## ADVISORY POSITIONS

- Pontifical Council for the Interpretation of Legal Texts
- Consultor, 1985-2001
- Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
- Consultor, 1995-2000
- Canadian Conference of Catholic Bishops, Canon Law and Inter-Rite Commission
- Consultor, 1972-2005
- Special Commission for Study of the Reform of Matrimonial Processes in Canon Law
- Member, 2014
- Canadian Religious Congregations
- Special advisor to 85 Canadian religious institutes

### Episcopal conferences

Special advisor on preparation for and implementation of the 1983 *Code of Canon Law*. In this regard, presented lectures to bishops, priests, and religious in Vatican City, England, Ireland, France, Poland, Spain, Italy, Germany, Canada, USA, South Africa, Lesotho, Ghana, Australia, New Zealand, Sri Lanka, Mexico, Denmark, Korea, Thailand, Peru, Trinidad and Tobago, Switzerland, etc.

Expert witness in civil courts in Canada, Singapore, Namibia, and U.S.A. for cases regarding Church-State relations

### ECCLESIASTICAL POSITIONS

Defender of the Bond, Canadian Military Vicariate, 1967

Judge, Quebec Metropolitan Tribunal, 1973-1983

Judge, Canadian Appeal Tribunal (Ottawa), 1983-2019

Chaplain, Thomas More Lawyers Guild, Ottawa, 1984 -2019

### SPECIAL AWARDS

#### Honorary Life Member

The Canadian Canon Law Society

The Canon Law Society of America

The Canon Law Society of Great Britain and Ireland

The Canon Law Society of Australia and New Zealand

The Canon Law Society of Southern Africa

Saint Paul University, Ottawa, Centennial Medal, 1989

Canon Law Society of America, Role of Law Award, 1990

Canadian Canon Law Society, Award of Merit, 1992

Pope John Paul II, Papal Honour, *Pro Ecclesia et Pontifice*, 1997

Catholic Health Association of the United States, Lifetime Achievement Award, 2019

Catholic Health Association of Canada, “2002 Performance Citation Award”

Saint Paul University, Eugene de Mazènod Medal, 6 May 2020

Saint Paul University, Francis Morrisey Scholarship for Canon Law Students (estab. 2020)

### *Bibliography*

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- “The Juridical Situation of the Catholic Church in Lower and Upper Canada from 1791 to 1840,” in *StC*, 5 (1971), 279-321.  
Translation: “La situation juridique de l’Église catholique au Bas-Canada de 1791 à 1840,” in *La Société canadienne d’histoire de l’Église catholique, Sessions d’Études*, 39 (1972), 65-89.
- “Recent Ecclesiastical Legislation and the Code of Canon Law,” in *StC*, 6 (1972), 3-77.
- “The Apostolic Succession of the Canadian Latin Rite Bishops,” in *StC*, 6 (1972), 315-348.
- Documentation on Marriage Nullity Cases*, G. LESAGE and F. MORRISEY (eds.), Ottawa, Saint Paul University, 1973, vi-312p.
- Textes canoniques depuis 1959*, 3 vol., Ottawa, Université Saint-Paul, textes reproduits de *La Documentation catholique*, avec index.
- “Preparing Ourselves for the New Law. Law Alone Will Not Hold the Church Together,” in *StC*, 7 (1973), 113-128.  
Reprinted: *The Messenger*, Colombo, Sri Lanka, 109:24 (June 1978), 4, 8; 109:25 (June 1978), 4-5, 8.
- “Preparing Ourselves for the New Marriage Legislation,” in *J*, 33 (1973), 343-357.
- “Ten Years of Liturgical Legislation,” in *StC*, 7 (1973), 289-308.
- “The Incapacity of Entering into Marriage,” in *StC*, 8 (1974), 5-21.
- “Regional Tribunals,” in *New Catholic Encyclopedia (NCE)*, Suppl. I, vol. 16, 375-376.
- “Proposed Changes in Canonical Matrimonial Legislation,” in *The Catholic Lawyer*, 20 (1974), 30-43.
- “The Renewal of Sacramental Canon Law after the Second Vatican Council,” in *Église et théologie*, 5 (1974), 347-373.
- “Proposed Legislation on Defective Matrimonial Consent,” in *CLSAP*, 36 (1974), 71-82.  
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- The Canonical Significance of Papal and Curial Pronouncements*, Hartford, CLSA, 1974, 23p.  
Translation: *Valeur canonique des proclamations papales et curiales*, Ottawa, Conférence religieuse canadienne, 1978, 24p.

- “The Spirit of the Proposed New Law for Institutes of Consecrated Life,” in *StC*, 9 (1975), 77-94.  
Reprinted: Jordan HITE et al. (eds.), *Readings, Cases, Materials in Canon Law. A Textbook for Ministerial Students*, Collegeville, Liturgical Press, 1980, 178-192 (= HITE et al. [eds.], *Readings, Cases, Materials in Canon Law*).
- “Matrimonial Legislation: Towards New Church Law,” in *Origins*, 4 (1974-1975), 321-328.
- “Influence of Personality Disorders,” in *StC*, 9 (1975), 184-187.
- “The Role of Canon Law Today,” in *Chicago Studies*, 15 (1976), 236-253.  
Reprinted: George J. DYER (ed.), *A Pastoral Guide to Canon Law*, Dublin, Macmillan, 1977, 8-29.
- “Les éléments de Droit Anglo-Saxon qui pourraient être incorporés au nouveau Droit canonique de procédure,” in *ME*, 106 (1976), 240-253.
- “The Juridical Status of Women in Contemporary Ecclesial Law,” in *CLSGBI Newsletter*, 31 (December 1976), 14-36.  
Reprinted: James A. CORIDEN (ed.), *Sexism and Church Law. Equal Rights and Affirmative Action*, New York, Paulist Press, 1977, 1-20.
- “The Conveyance of Ecclesiastical Goods,” in *CLSAP*, 38 (1976), 123-137.  
Reprinted: HITE et al. (eds.), *Readings, Cases, Materials in Canon Law*, 292-306.
- “The Meaning of a Beatification,” in *Annales Notre-Dame du Cap*, 35 (1976), 4-5.
- “When Marriage Fails,” in *National Bulletin of Liturgy*, 10 (1977), 179-181.
- “L'accès au sacerdoce de religieux appartenant à des instituts exclusivement laïcs,” dans *L'Église canadienne*, 11 (1977), 145-148.
- “The Juridical Significance of the Declaration,” in Leonard SWIDLER and Arlene SWIDLER (eds.), *Women Priests. A Catholic Commentary on the Vatican Declaration*, New York, Paulist Press, 1977, 19-22.
- “The Procedural and Administrative Reforms of the Post-Conciliar Church,” in *Concilium*, 127 (1977), 77-87.  
Translations: “Die Verfahrens- und Verwaltungsreform der nachkonziliaren Kirche,” in *Concilium*, 127 (1977), 470-476.
- “Reformas procesales y administrativas en la Iglesia postconciliar,” in *Concilium*, 127 (1977), 107-117.
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- “Réformes judiciaires et administratives de l’Église post-conciliaire,” in *Concilium*, 127 (1977), 105-116.
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- “The Spirit of Canon Law. Teachings of Pope Paul VI,” in *Origins*, 8 (1978-1979), 33, 35-40.  
 Reprinted: *ORE*, 9 November 1978, 6-7-8.  
 Reprinted: *Les cloches de Saint-Boniface*, 78 (1979), 259-267.  
 Reprinted: HITE et al. (eds.), *Readings, Cases, Materials in Canon Law*, 19-31.  
 Translation: “L’esprit du droit dans l’enseignement de Paul VI,” in *ORF*, 1 August 1978, 4-5, 8.  
 Reprinted: “L’esprit du droit dans l’enseignement de Paul VI,” Diocese of Saint-Hyacinthe, Documentation spéciale, n. 162, 8p.
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 Reprinted: HITE et al. (eds.), *Readings, Cases, Materials in Canon Law*, 79-94.
- “The Development of Canon Law in Canada since the Second Vatican Council,” in *DE*, 89 (1978), 188-203.
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- “Revising Church Legislation on Marriage,” in *Origins*, 9 (1979-1980), 210-218.
- “The Development of Particular Canonical Legislation in Canada,” in *Église et théologie*, 11 (1980), 205-227.
- “Pope, Election of,” in *NCE*, Supplement, vol. 17, 523-524.
- “The Preparation of Constitutions and Rules,” in *O.M.I. Documentation*, 96/80 (1 August 1980), 1-7.  
 Translations: French, German, Spanish, Italian, Polish
- “Niedojrzalosci konsens matzenski,” in *Roczniki Teologiczno-Kanoniczne*, 27 (1980), 5-19.
- “The Impediment of Ligamen and Multiple Marriages,” in *J*, 40 (1980), 406-418.
- “Marriage Legislation in the New Code,” *CLSAP*, 42 (1980), 78-81, 92.
- “The Importance of Particular Law,” in *Origins*, 11 (1981-1982), 421, 423-430.  
 Reprinted: “The Significance of Particular Law in the Proposed New Code of Canon Law,” *CLSAP*, 43 (1981), 1-17.

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Reprinted: CHA (ed.), *The New Canon Law*, 36-48.  
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- “Wrestling with One Code for Hundreds of Cultures,” in *The Prairie Messenger*, 59:45 (1982-1983), 13.
- “Important Changes in the Marriage Law,” in *The Prairie Messenger*, 59:46 (1982-1983), 12.
- “Some Changes Regarding Marriage Impediments,” in *The Prairie Messenger*, 59:47 (1982-1983), 12.
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 Reprinted: *CLSGBI Newsletter*, 72 (December 1987), 25-34.  
 Reprinted: in *CLSANZ Newsletter*, (Spring 1988), 60-69.
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- “Is the New Code an Improvement for the Law of the Catholic Church?” in *Concilium*, 185 (1986), 32-41.  
 Translations: “Il nuovo Codice migliora la legge della Chiesa cattolica?” in *Concilium*, 185 (1986), 59-71.  
 “El nuevo Código, l’avance para la legislación de la Iglesia?” in *Concilium*, 185 (1986), 355-368.  
 “Ist der neue Kodex ein Gewinn für das Recht der katholischen Kirche?” in *Concilium*, 185 (1986), 185-191.  
 “Is de nieuwe Codex een verbetering voor de wet van de katholieke kerk?” in *Concilium*, 185 (1986), 37-44.  
 “Le nouveau Code améliore-t-il le droit de l’Église catholique?” in *Concilium*, 205 (1986), 53-63.
- “Juridic Status: Canonical Provisions, Possible Applications,” in *Health Progress*, 67:7 (1986), 41-44 (special issue on alternative sponsorship of healthcare institutions).
- “Marriage in Canon Law,” in *Doctrine and Life*, 36 (1986), 359-362.
- “Decisions of Episcopal Conferences in Implementing the New Law,” *CLSGBI Newsletter*, 67 (1985-1986), 52-72.  
 Reprinted: *StC*, 20 (1986), 105-121.
- “La contribution nord-américaine à la préparation et à la mise en application du nouveau Code de droit canonique,” in *REDC*, 43 (1986), 47-60.

- “Practical Points for Formation Directors in the New Code,” in Religious Formation Conference, Washington, D.C., *In-formation*, 92 (March-April 1986), 1-5.  
 Reprinted: CANADIAN RELIGIOUS CONFERENCE, Recherche-Research, *Dossiers*, 401-71 (1986), 5-10.  
 Reprinted: CCLS, *Bulletin de nouvelles – Newsletter*, 12:1 (1986), 61-66.  
 Translation: “Points pratiques du nouveau Code pour les directeurs de formation,” CONFERENCE RELIGIEUSE CANADIENNE, Recherche-Research, *Dossiers*, 401-71 (1986), 6-11.
- “Applying the 1983 *Code of Canon Law*: The Task of Canonists in the Years Ahead,” in Michel THERIAULT and Jean THORN (eds.), *The New Code of Canon Law*, Ottawa, Saint Paul University, 1986, 1143-1160.
- “Relations between Oriental Rite and Latin Rite Catholics in Canada,” in J. ANDRIJISYN (ed.), *Millennium of Christianity in Ukraine. A Symposium*, Ottawa, Saint Paul University, 1987, 253-267.
- “Foreword,” in Geoffrey ROBINSON, *Marriage. Divorce and Nullity. A Guide to the Annulment Process in the Catholic Church*, Ottawa, Novalis, 1987, 6-8.
- “What Makes an Institution ‘Catholic’,” in *J*, 47 (1987), 531-544.
- “Issues of Confidentiality in Religious Life,” in *Bulletin on Issues of Religious Life*, 4:1 (1988), 1-10.  
 Reprinted: CLSGBI *Newsletter*, 76 (December 1988), 21-34.  
 Reprinted: Patrick J. COGAN (ed.), *Selected Issues in Religious Law*, Washington, D.C., CLSA, 1997, 124-134.
- “La formation des séminaristes et le respect de la personne,” in *StC*, 22 (1988), 5-25.
- “Respuesta a la conferencia de G. Feliciani,” in Hervé LEGRAND, Julio MANZANARES, Antonio GARCIA Y GARCIA (eds.), *Naturaleza y futuro de las conferencias episcopales*, Salamanca, Universidad Pontificia, 1988, 47-51.  
 Translation: “Riposta alla relazione di G. Feliciani,” in *Natura e futuro della Conferenze episcopali*, Bologna, Edizioni Dehoniane, 1988, 45-48.  
 Translation: “Episcopal Conferences and the Three *Munera*,” in *J*, 48 (1988), 26-29.  
 Translation: “Réponse à la conférence de G. Feliciani,” in *Les conférences épiscopales*, Paris, Cerf, 1988, 47-51.
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- “Ownership of Church and Congregational Property and Its Implications for Leadership,” in Australian Catholic Health Care Association, *Conference Proceedings, Vision, Growth and Leadership*, Brisbane, 1988, 86-106.  
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- “Ordinary and Extraordinary Administration: Canon 1277,” in *J*, 48 (1988), 709-726.
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- “Access to the Sacraments,” in *CLSAP*, 52 (1990), 170-186.
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- “Equity and Charity to Separated Members of Religious Institutes,” in CLSGBI Newsletter, 87 (September 1991), 14-15.
- “The Pastoral and Juridical Dimensions of Dismissal from the Clerical State and of Other Penalties for Acts of Sexual Misconduct,” in CLSAP, 53 (1991), 221-239.
- “Marriage Law in the Code of Canons of the Eastern Churches,” 3 April 1992, Ottawa, CCCB, 1992, 11p.  
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Translation: “Le droit matrimonial dans le Code des canons des Églises orientales,” 3 April 1992, Ottawa, CECC, 10p.  
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Reprinted: *CLSA AdOp1*, 419-421.
- “Church Law’s Role in Collaborations,” in *Health Progress*, 74 (November 1993), 24-29.
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# THE JURIDICAL SYSTEM OF THE VATICAN CITY STATE

JUAN IGNACIO ARRIETA

**SUMMARY** — The modern Vatican City State, dating back to the Lateran Pacts of 1929, has a unique juridical order consisting of canonical provision, its own civil law, and supplementary Italian laws applicable when there are no canonical or Vatican civil provisions on a matter. This study is an overview of the laws given for the Vatican City State that are currently in force.

**RÉSUMÉ** — L'État moderne de la Cité du Vatican, datant des pactes du Latran de 1929, a un ordre juridique unique composé de dispositions canoniques, de son propre droit civil et de lois italiennes supplémentaires applicables lorsqu'il n'y a pas de dispositions canoniques ou civiles du Vatican en une matière. Cette étude est un aperçu des lois données pour l'État de la Cité du Vatican qui sont actuellement en vigueur.

## *Introduction*<sup>1</sup>

The Lateran Treaty,<sup>2</sup> together with the Concordat between the Holy See and the Kingdom of Italy, forms part of the Lateran Pacts solemnly ratified on 7 June 1929. It gave rise to the Vatican City State and its peculiar juridical order, basically composed—as will be said later—by canonical provisions, specific Vatican norms, and Italian norms referred to in the supplementary form, and accepted under specific conditions, if there are no applicable canonical or Vatican provisions. Since 1929, the Vatican legislator has

<sup>1</sup> For a comprehensive treatment of the Vatican system, see Francesco CAMMEO, *Ordinamento giuridico dello Stato della Città del Vaticano*, Florence, 1932 (rist. 1932, Vatican City, 2005); and Pio CIPROTTI, *Appunti di diritto privato vaticano*, Rome, 1938. More recently, see Giuseppe DALLA TORRE, *Lezioni di Diritto Vaticano*, Turin, 2018, 237 pp.; Juan Ignacio ARRIETA, *Corso di Diritto Vaticano*, Rome, 2021, 386 pp.; and IDEM, *Codice di Norme Vaticane*, Rome, 2021, 883 pp.

<sup>2</sup> Cf. *Trattato fra la Santa Sede e l'Italia*, 11.II.1929, in AAS, 21 (1929), 209-221.

provided regulation of its own civil laws concerning aspects of social life and the management of public functions of the State. In these pages, I intend to present succinctly, with limited comments, an overview of these laws specifically given for the Vatican City State that are currently in force.

The legislative production of the Vatican City State is reduced. In the files of the Supplement for the Laws and Provisions of the Vatican City State to the *Acta Apostolica Sedis*, legislative provisions of numismatic, philatelic, postal, etc. of relevance are published for the most part. Other times, however, the Supplement does not take up texts that are instead relevant to the juridical system of the State, and the promulgation of the norms are frequent both through the insertion in *L'Osservatore Romano* and *per tabulas*, by posting in the courtyard of San Damaso.

For the purposes of exposition, I will refer first of all to the bilateral norms, that is, to the Conventions and agreements between Italy and the Holy See which are the development of art. 6 of the Lateran Treaty and serve the sustainability of the State itself. Secondly, I will deal with the norms that concern the juridical organization of the State. Subsequently, I will present the main norms that regulate the life of the State, in civil, penal, labor and management of service matters. Finally, I will take into consideration the juridical sector that has been most developed in recent years, concerning the area of financial management and supervisory control systems, most of which also serve for the set of bodies that refer directly to the Apostolic See, starting with the Roman Curia.

On the same day that the Lateran Pacts were ratified, Pope Pius XI promulgated a series of six laws that have long been the backbone of the juridical order of the Vatican City State.<sup>3</sup> Some of them have been replaced more recently, while others remain in force albeit partially. At the head of these laws, as the ark of the entire juridical structure of the new State, is the *Fundamental Law* n. I, which from a technical point of view, passed to occupy the place that in other juridical systems correspond to their respective national constitution. Alongside it, the Pope also promulgated Law n. II *on the sources of law*, which outlined the guidelines of the normative hierarchy and of the integration of State norms, identifying each of the juridical sources

<sup>3</sup> Cf. POPE PIUS XI, *Legge fondamentale* n. I, of 7.VI.1929, in *AAS Suppl.*, 1 (1929), 1-4; IDEM, Law n. II *sulle fonti del diritto*, of 7.VI.1929, in *AAS Suppl.*, 1 (1929), 5-13; IDEM, Law n. III *sulla cittadinanza ed il soggiorno*, of 7.VI.1929, in *AAS Suppl.*, 1 (1929), 14-21; IDEM, Law n. IV *sull'ordinamento amministrativo*, of 7.VI.1929, in *AAS Suppl.*, 1 (1929), 21-24; IDEM, Law n. V *sull'ordinamento economico, commerciale e professionale*, of 7.VI.1929, in *AAS Suppl.*, 1 (1929), 25-28; IDEM, Law n. VI *di pubblica sicurezza*, of 7.VI.1929, in *AAS Suppl.*, 1 (1929), 28-31.

and ordering a balanced system of hermeneutic composition between norms of canonical procedure, laws specifically given by the Vatican legislator, and supplementary provisions from the Italian State.

These two norms promulgated by Pope Pius XI in 1929—the *Fundamental Law* n. I and Law n. II *on the sources of law*—together with the Lateran Treaty itself, serve as the heart of the legislative texts of the Vatican City State. They remained formally in force until recently when they were replaced by the new Fundamental Law in November 2000<sup>4</sup> and the new Law n. LXXI *on the sources of law* of 1 October 2008.<sup>5</sup>

## 1 — *Bilateral Norms between the Holy See and the Italian State*

An important part of the Lateran Treaty—which begins with the recognition of the international sovereignty of the Holy See (art. 2)—is intended to delimit the places and people over which the new State—that Italy recognizes under the sovereignty of the Supreme Pontiff (art. 26)—would have exercised its sovereign jurisdiction. Over the years, the alternations between the Holy See and Italy, regarding the juridical status of the places mentioned in the Treaty (in particular those indicated in articles 14, 15 and 16), have been numerous and, as a rule, the modifications took place through the diplomatic way of exchanging Verbal Notes.<sup>6</sup> The changes were motivated, as a general rule, due to urban changes in the territory or the need to move the location of the dicasteries of the Holy See.

Art. 6 of the Lateran Treaty, taking particular account of the limited size and nature of the Vatican's "enclave" in Italy, had foreseen the need to subsequently establish sector agreements between Italy and the Vatican State that would allow the viability of the new State. The first of these was the Postal Convention of 29 July 1929,<sup>7</sup> followed a few months later by other agreements guaranteeing free international communications, such as the Convention concerning telegraph and telephone services,<sup>8</sup> and the Convention

<sup>4</sup> Cf. POPE JOHN PAUL II, *Legge Fondamentale dello Stato della Città del Vaticano*, of 26.XI.2000, in AAS *Suppl.*, 71 (2000), 75-83.

<sup>5</sup> Cf. POPE BENEDICT XVI, Law n. LXXI *sulle fonti del diritto*, of 1.X.2008, in AAS *Suppl.*, 79 (2008), 65-70.

<sup>6</sup> Cf. J.I. ARRIETA, *Codice di norme vaticane*, Venezia, 2006, 585-638.

<sup>7</sup> Cf. *Convenzione per la esecuzione dei servizi postali tra lo Stato della Città del Vaticano e il Regno d'Italia*, of 29.VII.1929.

<sup>8</sup> Cf. *Convenzione fra lo Stato della Città del Vaticano ed il Regno d'Italia per la esecuzione dei servizi telegrafici e telefonici*, of 18.XI.1929.

to regulate the circulation of motor vehicles.<sup>9</sup> The following year a Customs Convention was concluded,<sup>10</sup> which regulated the flow of goods under state monopoly, followed in 1932 by a Convention for the notification of juridical documents,<sup>11</sup> by the Railway Convention in 1933,<sup>12</sup> by the Hospital Convention in 1934,<sup>13</sup> and the 1938 Mortuary Police Convention.<sup>14</sup> As is natural, several of these agreements have undergone significant changes over time, especially if they had some tariff component, and in some cases have resulted in the corresponding adhesion of the Holy See to the relevant international conventions of each sector.

More recently, other important conventions have arisen such as the Social Security Convention with Italy of the year 2000<sup>15</sup> and the related Administrative Agreement of the same year<sup>16</sup> and, finally, the Tax Agreement with Italy of 1 April 2015,<sup>17</sup> which has put an end to continuous friction caused largely by the failure to define the norms in question. The agreements and conventions just mentioned are to be considered developments of the Lateran Treaty, and they are all bilateral norms between the Holy See and the Italian State.

In this bilateral sector, although with particular characteristics, mention should be made of the 2009 Monetary Convention between the European Union and the Vatican City State.<sup>18</sup>

As early as 1929 the Vatican adopted the lira as the official currency of the State, and in the following decades Monetary Conventions with Italy were established and renewed that allowed certain quotas of currency to be minted with the symbols of the Vatican State. As a consequence of the adop-

<sup>9</sup> Cf. *Convenzione per disciplinare la circolazione degli autoveicoli nei territori dello Stato della Città del Vaticano e del Regno d'Italia*, of 28.XI.1929.

<sup>10</sup> Cf. *Convenzione doganale tra lo Stato della Città del Vaticano e il Regno d'Italia*, of 30.VI.1930.

<sup>11</sup> Cf. *Convenzione fra la Santa Sede e l'Italia per la notificazione degli atti in materia civile e commerciale e Dichiarazione annessa*, of 6.IX.1932.

<sup>12</sup> Cf. *Convenzione ferroviaria fra la Santa Sede e il Governo d'Italia*, of 20.XII.1933.

<sup>13</sup> Cf. *Convenzione ospedaliera tra la Santa Sede e il Governo Italiano*, of 4.X.1934.

<sup>14</sup> Cf. *Convenzione tra la Santa Sede e il Regno d'Italia circa i servizi di polizia mortuaria*, of 28.IV.1938.

<sup>15</sup> Cf. *Convenzione di Sicurezza sociale tra la Santa Sede e la Repubblica italiana*, of 16 giugno 2000, in AAS, 95 (2003), 830-848.

<sup>16</sup> Cf. *Accordo amministrativo per l'applicazione della Convenzione di Sicurezza sociale tra la Santa Sede e la Repubblica Italiana*, of 16.VI.2000, in AAS, 95 (2003), 849-861.

<sup>17</sup> Cf. *Convenzione in materia Fiscale tra la Santa Sede e il governo della Repubblica italiana*, of 1.IV.2015, in AAS, 108 (2016), 1263-1274.

<sup>18</sup> Cf. *Convenzione Monetaria tra l'Unione Europea e lo Stato della Città del Vaticano*, of 17.XII.2009, in AAS, 202 (2010), 60-65.

tion of the euro as the currency of the Vatican State,<sup>19</sup> an initial Convention took place with the Italian Republic, on behalf of the European Union.<sup>20</sup> Starting in 2009, with the accession of the Holy See to the “monetary system” of the European Union, a direct Convention with the Union obliged the Holy See to carry out profound structural and regulatory reforms, as well as new commitments to adhere to new Conventions and Agreements in the international context.

## 2 — Organization and Governance of the State

The government structure of the Vatican City State is currently outlined, in its essential features, by the new Fundamental Law promulgated in 2000<sup>21</sup> to replace the one issued at the beginning of the State. As the previous Fundamental Law n. I of 1929, the new fundamental text—equivalent, up to a certain point, to a constitutional charter—identifies the specific elements that distinguish the State, indicating the bodies in charge of exercising the various functions of government and determining the institutional relations between these bodies and, in particular, their relations with the Supreme Pontiff. Naturally, it is a very different norm from the modern constitutions of the States, because the Vatican is a “peculiar” State, functional in all respects to protect the independence of the Supreme Pontiff. Therefore, the first article of the Fundamental Law affirms the fullness of power—legislative, executive and judicial—of the Pontiff in the Vatican City State,<sup>22</sup> although the ordinary exercise of these three juridical functions of government is entrusted to different bodies.<sup>23</sup>

<sup>19</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCCLVII, of 26.VII.2001, in AAS *Suppl.*, 72 (2001), 57-58.

<sup>20</sup> Cf. *Convenzione Monetaria tra lo Stato della Città del Vaticano e per esso la Santa Sede e la Repubblica italiana per conto della Comunità Europea*, of 29.XII.2000, in AAS, 93 (2001), 750-756.

<sup>21</sup> Cf. POPE JOHN PAUL II, *Legge Fondamentale dello Stato della Città del Vaticano*, of 26.XI.2000, in AAS *Suppl.*, 71 (2000), 75-83.

<sup>22</sup> “The Supreme Pontiff, Sovereign of the Vatican City State, has the fullness of legislative, executive and judicial powers” (art. 1, 1° *Legge Fondamentale dello Stato della Città del Vaticano*).

<sup>23</sup> “Legislative power, except in cases that the Supreme Pontiff intends to reserve for himself or for other instances, is exercised by a Commission composed of a Cardinal President and other Cardinals, all appointed by the Supreme Pontiff for a five-year term” (art. 3, 1° *Legge Fondamentale dello Stato della Città del Vaticano*).

At the present moment, legislative power is usually exercised by a Commission of Cardinals, which has its own Regulations,<sup>24</sup> even if the Pontiff can always reserve its exercise to himself or to other instances. Executive power—which includes those of second normative degree—is stably entrusted to the President of the Governorate (*Governatorato*), who exercises it through a specific organization compliant with the Law on the Government of the Vatican City State.<sup>25</sup> The Governorate is, in fact, the administrative structure that oversees the punctual exercise of the functions and services of the State. Finally, the exercise of the judicial function is deferred to the State courts, integrated by professional magistrates and now structured according to the Law n. CCCLI of 16 March 2020,<sup>26</sup> to which there is to be added, as regards canonical causes, an ecclesiastical court with jurisdictions within the State.<sup>27</sup> In general terms, it should also be added that, with different *motu proprios* starting from 2013, the jurisdiction of the civil Courts of the State has also been extended to employees of the Roman Curia and the Holy See as regards certain aspects of penal law, as well as financial crimes.<sup>28</sup>

The new Law on the Government of the Vatican City State, promulgated on 25 November 2018, establishes the administrative organization and functioning of the Governorate. In fact, this law follows the structural approach of the previous norms of 2002, adding elements of organizational simplification and functionality. It dedicates its first articles to defining the competence of its functions, aimed at guaranteeing the Holy See visibility and independence, which is a guarantee of the universal and pastoral mission of the Supreme Pontiff.

The juridical and economic activity of the Vatican City State gravitates to a large extent around the Governorate. The employees of the Governorate have their own statute, different from that of the employees of the Roman Curia, even if the respective norms are inspired by similar criteria and the welfare and social security rules are common to all employees of entities directly managed by the Holy See.

<sup>24</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCCLVIII, of 26.VII.2001, in *AAS Suppl.*, 72 (2001), 63-67.

<sup>25</sup> Cf. POPE FRANCIS, Law n. CCLXXIV of 25.XI.2018, in *AAS Suppl.*, 89 (2018), 221-236.

<sup>26</sup> Cf. POPE FRANCIS, Law n. CCCLI of 16.III.2020, in *AAS Suppl.*, 91 (2020), 57-68, modif. by *motu proprio* *Esigenze emergere*, of 8.II.2021, in *L'Osservatore Romano*, 16.II.2021, 8.

<sup>27</sup> Cf. POPE JOHN PAUL II, m.p. *Quo civium iura*, of 21.XI.1987, in *AAS*, 79 (1987), 1353-1355.

<sup>28</sup> Cf. POPE FRANCIS, m.p. *Ai nostri tempi*, of 11.VII.2013, in *AAS*, 105 (2013), 651-653.

### 3 — *The Sources of Law*

Around the Vatican City State a singular juridical order has been formed with special characteristics, partly dictated by the instrumental role that the aforementioned State fulfills. In the case of the Vatican State, the normal claims by any sovereign order of coherence and totality must be measured against the narrow limits of its economic-juridical exchange, the particular configuration of its own people and the present general needs of sustainability, to point out only some peculiarities of this State. For these reasons, the set of norms promulgated on 7 June 1929 marked precise criteria of legislative economy and realistic adaptation to the juridical context in which the Vatican system was to operate, criteria substantially confirmed by practice in the following decades. A Vatican law was then designed which, as a normative system, lives to a large extent from the postponement of accommodation, accepting norms—currently in force, or in force in past eras—from other juridical systems, mainly the canonical one and, in a different way, the Italian State one, which under specific conditions is received as a supplement. For this reason, Vatican law has also established its own system of precautions aimed at protecting the identity and consistency of its juridical system in the various steps imposed by the receipt of Italian legislation.

The map of the system of legal sources is drawn from the already mentioned Law LXXI *of the sources of law*,<sup>29</sup> which begins by identifying the three regulatory groups to which the system refers, assigning each one the role it deserves. The first group is formed by the canonical system which, as stated in art. 1, 1<sup>o</sup>,<sup>30</sup> represents—as a whole, unless there are specific and non-conflicting Vatican laws—“the first normative source and the first interpretative reference criterion” of the Vatican legal system. A second group of “main sources of law” is made up of the laws promulgated for the Vatican City State by the legitimate authorities. Finally, the third group of laws in force in the State, with a supplementary character “and subject to transposition by the competent Vatican authority,” consists of “laws and other regulatory acts issued in the Italian State.”<sup>31</sup>

<sup>29</sup> Cf. POPE BENEDICT XVI, Law n. LXXI of 01.10.2008, in *AAS Suppl.*, 79 (2008), 65-70.

<sup>30</sup> “1.- The Vatican legal system recognizes the canonical legal system as the first normative source and the first criterion of reference for interpretation. 2.- Principal Sources of Law are the Fundamental Law and the laws promulgated for the Vatican City State by the Supreme Pontiff, by the Pontifical Commission or by other authorities on which he has conferred the exercise of legislative power” (art. 1, 1<sup>o</sup>-2<sup>o</sup>, Law n. LXXI, cit.).

<sup>31</sup> “1.- In those matters for which the sources indicated in art. 1 do not provide, the laws and other regulatory acts issued in the Italian State shall be observed, in a suppletive way and subject to adoption by the competent Vatican authority. 2.- This shall be done on condition

The reference to canon law in Law LXXI *of the sources of law* of 2008 is made in an appreciably different way from how the Law of 1929 did, and this from different perspectives. To begin with, the term “recognize,” which is now used, already expresses a relationship of ineluctability between the State and canon law that was missing before, recognizing it as a necessary requirement of its social configuration. In fact, the peculiar nature of the Vatican City State makes it problematic above all to consider this mention of canon law as a simple “reference,” since canon law does not appear as a foreign body to the Vatican legal system but as an integral element that is a necessary part of itself. In reality, while accepting the fact that canonical norms are only partially capable of resolving the needs of the juridical traffic of a state, Vatican law here makes an overall appropriation of the canonical order.

The fact, then, that the Law *of the sources of law* of 2008 indicates the canonical order as the “first criterion of reference for interpretation”—an expression absent in the law of 1929—intends to indicate another important novelty introduced now in the Vatican system, also as regards the treatment of receptive sources of the Italian juridical system. The new law gives whit of a strong affirmation of identity, in contrast to the criterion according to which the interpretative elements had to be found in the system of origin of the transposed norms. On the other hand, some of the matters dealt with in these laws by the Vatican legislator touch upon matters that are usually subject to norms of constitutional rank. Thus, the juridical status—quite particular—of the “citizen” of the State is now dealt with by Law n. CXXXI on citizenship, residence, and access,<sup>32</sup> which in 2011 replaced Law III on citizenship and residence promulgated in 1929. The new law is completed by an Access Regulation that has been in force since 1932, with partial changes made in 2007.<sup>33</sup>

Instead, some laws that were part of the initial legislative package promulgated by Pius XI on 7 June 1929 are still partially in force. For example, Law n. IV on *the administrative system*,<sup>34</sup> which contains a developing, but essential, description of the administrative apparatus of the new State and its activities, even if its content was developed by norms that followed one

that they are not contrary to the precepts of divine law, or to the general principles of canon law, or to the norms of the Lateran Pacts and subsequent Agreements, and provided that, in relation to the state of affairs existing in Vatican City, they are applicable there” (art. 3, Law n. LXXI, cit.).

<sup>32</sup> Cf. POPE BENEDICT XVI, m.p. Law n. CXXXI, of 22.II.2011, in *AAS Suppl.*, 82 (2011), 1-7.

<sup>33</sup> Cf. GOVERNOR OF S.C.V., Regulation n. XXXVI of 27.XII.1932, in *AAS Suppl.*, 4 (1932), 73-76.

<sup>34</sup> Cf. POPE PIUS XI, Law n. IV of 07.VI.1929, in *AAS Suppl.*, 1 (1929), 21-24.



another in the following decades. Another example is Law n. V on the economic, commercial, and professional system,<sup>35</sup> which established the first general regulation of commercial activity within the Vatican City and of cross-border economic activity with Italy, establishing the foundations of the monopoly system and the customs administration. Finally, Law n. VI of public safety<sup>36</sup> of 1929, contains provisions on public order and the safety of subjects, together with a list of prohibitions in matters that are commonly considered in the States as political rights of citizens. It should not be forgotten, in fact, that the Vatican is an “instrumental” state, where the only politically protected subject is the person of the Supreme Pontiff.

In civil matters, the previous Law n. II *of the sources of law* of 1929 recalled as supplementary Vatican legislation two Codes then in force in the Kingdom of Italy: the Civil Code of 1865 and the Code of Commerce of 1882. In the meantime, however, the relevant regulations of the 1882 Commercial Code have merged in Italy into the current Civil Code of 1942. Consequently, the postponement of the new Law on the sources of rights in the matter of civil law concerns precisely the current civil Code of 1942. However, the reference to the Italian Civil Code is now made in a different way from that of Law n. II on the sources of the law of 1929. In 1929 the Code then in force was implemented “together with the laws that modified or integrated it and the related regulations” (art. 11). Instead, the modalities of the reference to the Italian Civil Code of 1942 that now makes the Law are much more measured and concern only the Civil Code itself and the “laws that modified it until the entry into force of this law” (art. 4). With deliberate intentionality, the law omits any reference to the “supplementary” Italian legislation of the civil code of 1942, certainly not scarce, nor absent of inadmissible findings in the Vatican State.

As in 1929, the postponement of art. 4 of the Italian Civil Code is carried out with the explicit exclusion of the matters indicated in the text, for which there is already a primary, canonical or Vatican law of application or the legislator wishes to explicitly reserve to his authority, such as adoption. The list, however, while partly excluding Italian civil law, as mentioned, is not exhaustive, because it does not intend to explain in full the content of the main sources of law, indicated by art. 1, nor their effective validity.

The following matters indicated in art. 4 of the *Law of the sources of law* are explicitly excluded from the reference to the Italian Civil Code: a) the rules on citizenship, for which there is already a Vatican provision; b) the rules on

<sup>35</sup> Cf. POPE PIUS XI, Law n. V of 07.VI.1929, in *AAS Suppl.*, 1 (1929), 25-28.

<sup>36</sup> Cf. POPE PIUS XI, Law n. VI of 07.VI.1929, in *AAS Suppl.*, 1 (1929), 28-31.

the ability to carry out any juridical act, to acquire and dispose of it by negotiation between the living or due to death by clerics, members of religious institutes of consecrated life and societies of apostolic life, regulated by canon law; c) marriage, also regulated by canonical provisions; d) adoption which, in the Vatican State, is authorized by the Supreme Pontiff; e) the rules on the prescription of ecclesiastical goods and the rules on the possession of privileges, also regulated by canonical norms; f) donations and bequests *mortis causa*, also regulated by canon law; g) juridical acts concerning the natural person: birth, marriage, and death, which follow Vatican legislation; h) the registers of citizens and the registry office, the Governorate takes care of them; i) employment relationships, for which an autonomous working system has already been established; j) the exercise of notarial functions, exercised by lawyers, designated by the President of the Governorate, k) the functions of preservation of mortgages which, “for the purposes of the transcripts and mortgage registrations, are exercised” by the competent Directorate of the Governorate (art. 4 Law n. LXXI). Obviously, the new *Law of the sources of law* lacks the reference to the Code of civil procedure, which the 1929 law of the same name made, as the Vatican State now has, as already mentioned, its own promulgated code of civil procedure in 1946.<sup>37</sup>

In penal matters, the *Law of the sources of law* continues to refer to the “Zanardelli” criminal code promulgated in Italy in 1889, as the previous law of 1929 did. This code is no longer in force in Italy. Similarly, for criminal procedure, the law now incorporates the same Italian Criminal Procedure Code of 1913, indicated by the law of 1929, while the one currently in force in Italy is from 24 October 1989.

Following the commitments made by the Vatican State on the occasion of the Monetary Convention celebrated with the European Union,<sup>38</sup> in addition to the rules concerning the financial system, as we shall see later, the penal system of the State had to be modernized. Before then, the modifications of the Zanardelli Penal Code had taken place, implemented by the Law on the sources of law, through Laws n. L, from 1969,<sup>39</sup> n. LII, from 1983,<sup>40</sup> n. CCXXVII, of 1994<sup>41</sup>. After the Monetary Convention of 2009, these changes were mainly

<sup>37</sup> Cf. PIUS XII, m.p. *Con la legge*, of 01.05.1946, in AAS, 38 (1946), 170-172.

<sup>38</sup> Cf. *Convenzione Monetaria tra l'Unione Europea e lo Stato della Città del Vaticano*, of 17.XII.2009, cit.

<sup>39</sup> Cf. POPE PAUL VI, Law n. L, of 21.VI.1969, in AAS *Suppl.*, 41 (1969), 13-26.

<sup>40</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. LII, of 10.I.1983, in AAS *Suppl.*, 41 (1970), 17-26.

<sup>41</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCXXVII, of 14.XII.1994, in AAS *Suppl.*, 65 (1994), 57-59.

added, in 2012, by Law n. CLXVI with rules on the prevention and fight against money laundering,<sup>42</sup> and then, in 2013, Law n. VIII containing complementary norms in penal matters,<sup>43</sup> the Law n. IX with amendments to the Penal Code and the Penal Procedure Code referred to by the Law *of the sources of law*,<sup>44</sup> and Law n. X which dictates general norms on administrative sanctions.<sup>45</sup>

More recently, Law n. CCXCVII on the protection of minors and vulnerable persons of 26 March 2019,<sup>46</sup> given by the Pope for the Vatican City State, Law n. CCCXXXVI which makes changes to the penal law of the S.C.V. of 20 December 2019,<sup>47</sup> with amendments to the Vatican Penal Code and the norms of penal procedure.

#### 4 — Norms on Employment Relationships

In recent decades, especially during the pontificate of John Paul II, the sector of the Vatican system concerning public service and labor law has been the subject of a profound and significant revision, in coherent application of the social doctrine of the Church. The modernization of the labor system has affected all employees of the Holy See, and not only those of the Vatican State, although part of the related discipline (especially the welfare and social security system) is the same for all.

For State employees, in addition to any specific rules of their own, the General Regulations for the staff of the Governorate of the S.C.V.,<sup>48</sup> which in 2010 replaced the Staff Regulations of the S.C.V. issued in 1995, contains the general statutes on employees. These are in a certain measure completed by the Regulations for lay management personnel of the Holy See and the S.C.V. of 2012.<sup>49</sup>

<sup>42</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CLXVI, of 24.IV.2012, in *AAS Suppl.*, 83 (2012), 25-74.

<sup>43</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. VIII, of 11.VII.2013, in *AAS Suppl.*, 84 (2013), 77-108.

<sup>44</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. IX of 11.VII.2013, in *AAS Suppl.*, 84 (2013), 109-131.

<sup>45</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. X, of 11.VII.2013, in *AAS Suppl.*, 84 (2013), 133-144.

<sup>46</sup> Cf. POPE FRANCIS, Law n. CCXCVII, 26.III.2019, in *Comm*, 51 (2019), 34-39.

<sup>47</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCCXXIX, of 1.X.2019, confirmed by Law n. CCCXXXVI, of 20.XII.2019, in *AAS Suppl.*, 90 (2019), 329-330.

<sup>48</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CXXVI, of 21.XI.2010, in *AAS Suppl.*, 81 (2010), 93-164.

<sup>49</sup> Cf. SECRETARIAT OF STATE, Rescript *ex audientia* of 22.X.2012, <http://www.ulsava/content/ulsait/publicazioni/norme-e-documenti>.

In connection with these provisions, there is also the Regulation of the Independent Evaluation Commission for the recruitment of lay staff of 2012<sup>50</sup> and the Regulations of the Disciplinary Commission of the S.C.V.,<sup>51</sup> with the corresponding procedure to be followed in the appeal against its resolutions.<sup>52</sup>

In the scope of this general reform of the labor system, in January 1989, John Paul II established the Labor Office of the Apostolic See (ULSA), as the instance to protect the interests of those who belong to the Holy See's working community and for the settlement of labor conflicts between the Administration itself and the employees. The Statute approved at the time was then modified on various occasions, and the one currently in force was approved by Benedict XVI with a *motu proprio* of 7 July 2009.<sup>53</sup>

Since the 1990s, all the welfare and social security institutions concerning employees have been reviewed on several occasions. Among the norms in force governing welfare institutions are the norms governing the granting of family allowances<sup>54</sup> and the text *Unico delle Provvidenze a favore della famiglia*.<sup>55</sup> There are four social security institutions: the Health Assistance Fund (FAS), whose statute was renewed in 2016<sup>56</sup> and has its own corresponding Regulations;<sup>57</sup> the Norms on benefits for accidents in service;<sup>58</sup> the norms for *liquidazione*;<sup>59</sup> the *pension funds*<sup>60</sup> with the corresponding Regulation;<sup>61</sup> and the Norms for the *Institute of voluntary contribution*.<sup>62</sup>

<sup>50</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Decree of 30.V.2017, <http://www.ulsa.va/content/ulsa/it/pubblicazioni/norme-e-documenti>.

<sup>51</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. LIX, of 15.III.2008, in *AAS Suppl.*, 79 (2008), 13-17.

<sup>52</sup> Cf. SECRETARIAT OF STATE, Rescript n. CCXLVIII of 3.II.1996, in *AAS Suppl.*, 67 (1996), 9-14.

<sup>53</sup> Cf. POPE BENEDICT XVI, m.p., Statuto dell'Ufficio del Lavoro della Sede Apostolica (ULSA) of 7.VII.2009, in *AAS*, 101 (2009), 712-726, modified by Rescript *ex audientia* of 14.VI.2015 and 28.XI.2016.

<sup>54</sup> Cf. SECRETARIAT OF STATE, Norme of 26.V.1992, modified on 24.III.2014, in *Bollettino ULSA*, 10 (2002), 33-40.

<sup>55</sup> Cf. SECRETARIAT OF STATE, Rescript *ex audientia* of 28.XI.2016, in *AAS*, 108 (2016), 1422-1435.

<sup>56</sup> Cf. POPE FRANCIS, *Statuto del Fondo di Assistenza Sanitaria*, of 18. X.2016.

<sup>57</sup> Cf. FONDO DI ASSISTENZA SANITARIA, Regulation of the *Fondo di Assistenza Sanitaria*, of 10.VII.2010, in *AAS*, 102 (2010), 484-497.

<sup>58</sup> Cf. SECRETARIAT OF STATE, *Norme per la disciplina delle prestazioni che competono al personale che ha subito lesione fisica o psichica da infortunio o contratto malattia per fatti di servizio*, of 22.I.1996, in *Bollettino ULSA*, 5 (1997), 7-35; modified by Decree of 8.V.2004, in *AAS*, 96 (2004), 431-433.

<sup>59</sup> Cf. SECRETARIAT OF STATE, Rescript *ex audientia* of 14.X.1997, in *AAS*, 89 (1997), 796-807.

<sup>60</sup> Cf. POPE FRANCIS, *Motu proprio*, Statuto del Fondo Pensioni of 28.V.2015, in *AAS*, 107 (2015), 509-519.

<sup>61</sup> Cf. POPE JOHN PAUL II, *Motu proprio* of 15.XII.2003, in *AAS*, 96 (2004), 213-238.

<sup>62</sup> Cf. SECRETARIAT OF STATE, Rescript *ex audientia* of 16.I.2010, in *AAS*, 102 (2010), 489-501.

To complete this general framework and in relation to safety and respect for workers, the LIV Law on the protection of the safety and health of workers in the workplace has been introduced into the Vatican system,<sup>63</sup> and the corresponding Implementation Regulation, issued with Decree n. LXXII.<sup>64</sup> Furthermore, with the Rescript *ex audientia* of 18 November 2011, Regulations were given for the protection of the dignity of the person and their fundamental rights to be observed in health checks in view of hiring staff and during the employment relationship, and containing also Regulations for protection of employees suffering from particular serious pathologies or in particular psychophysical conditions.<sup>65</sup>

## 5 — *The Administrative Law of the State*

Over the years, needs of various kinds have determined a varied legislative activity in specific matters. In this section are presented norms of major importance, following the various sectors according to the way the services of the Governorate are organized.

- a) *General State Services.* The main legislation is formed by the following provisions: Law n. LXII on the regulation of road traffic,<sup>66</sup> Decree n. CXXXIV in relation to the duties of the Goods Office,<sup>67</sup> Decree n. CCLXV on the validation of the licenses of circulation and driving licenses,<sup>68</sup> Decree n. CCLXXVIII of the Pontifical Commission for the S.C.V. with which the Regulations for the circulation of motor vehicles are promulgated,<sup>69</sup> Law n. CCXCVI amending the legislation on road traffic,<sup>70</sup> Law

<sup>63</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Law n. LIV, of 10.XII.2007, in *AAS Suppl.*, 78 (2007), 77-88.

<sup>64</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. LXXII, of 01.X.2008, in *AAS Suppl.*, 79 (2008), 73-96.

<sup>65</sup> Cf. SECRETARIAT OF STATE, Rescript *ex audientia* of 18.XI.2011, in *AAS*, 103 (2011), 848-859.

<sup>66</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. LXII, of 22.VI.1970, in *AAS Suppl.*, 41 (1970), 17-26.

<sup>67</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CXXXIV, of 1.IV.1977, in *AAS Suppl.*, 48 (1977), 9-11.

<sup>68</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCLXV, of 3.XII.1996, in *AAS Suppl.*, 67 (1996), 97-102.

<sup>69</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCLXXVIII, of 12.VI.1997, in *AAS Suppl.*, 68 (1997), 71-78.

<sup>70</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCXCVI, of 3.VI.1998, in *AAS Suppl.*, 69 (1998), 33-34.

- n. CCCXXXVI amending the legislation on road traffic,<sup>71</sup> and Ordinance n. CCCLXXV which determines financial penalties for circulation.<sup>72</sup>
- b) *Security and Civil Protection*. The main norms concerning the sector are: Decree n. XXXVIII on the Regulations of the Central Supervisory Office,<sup>73</sup> Decree n. CCCX establishing the “Safety Committee,”<sup>74</sup> Law n. CCCLXXIV which establishes the new name of the “Corps of the Gendarmerie” of the S.C.V.<sup>75</sup>
- c) *Health and Hygiene*. In this sector, the following norms are to be noted: Decree n. CCV of health obligations in cases of death in the territory of the S.C.V.,<sup>76</sup> Decree n. CCLXXVII which promulgates the Regulations of the Health Services Directorate,<sup>77</sup> and Law n. CCCLXXXII on smoking bans.<sup>78</sup> In the context of the Covid19 pandemic, the President of the Governorate issued Decree n. CCCXCVIII, which provides the State authority with legal instruments to deal with health emergencies.<sup>79</sup>
- d) *Cultural Heritage and Museums*. There are two main documents to report: Law n. CCCLV on the protection of cultural heritage,<sup>80</sup> and the relative regulation for the execution of the law on the protection of cultural heritage, issued with Decree n. CCCLVI,<sup>81</sup> both of 26 July 2001.

<sup>71</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCCXXXVI, of 8.VI.2000, in *AAS Suppl.*, 71 (2000), 43-48.

<sup>72</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Ordinance n. CCCLXXV, of 22.I.2002, in *AAS Suppl.*, 72 (2001), 151-154.

<sup>73</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. XXXVIII, of 30.XII.1981, in *AAS Suppl.*, 52 (1981), 79-92, modified by Decree n. CXXXVI of 1.II.1989, in *AAS Suppl.*, 59 (1989), 65-71.

<sup>74</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCCX, of 26.III.1999, in *AAS Suppl.*, 70 (1997), 13-15.

<sup>75</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCCLXXIV, of 2.I.2002, in *AAS Suppl.*, 72 (2002), 145-146.

<sup>76</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCV, of 22.VI.1993, in *AAS*, 64 (1993), 25-35.

<sup>77</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCLXXVII, of 12.VI.1997, in *AAS Suppl.*, 68 (1997), 43-66.

<sup>78</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCCLXXXII, of 14.VI.2002, in *AAS Suppl.*, 73 (2002), 25-26.

<sup>79</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCCXCVIII, of 8.II.2021, in *OR*, 9.II.2021, 8.

<sup>80</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCCLV, of 25.VII.2001, in *AAS Suppl.*, 72 (2001), 39-47.

<sup>81</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCCLVI, of 26-VII.2001, in *AAS*, *Suppl.* 72 (2001), 51-55.

On other matters, it has also developed, at least partially, its own system. Such is the case of the Law on the protection of copyright on intellectual property,<sup>82</sup> which replaces the other law of the same name promulgated in 1969,<sup>83</sup> although fundamentally it aims at the protection of the organs and structures of the state. A particularly interesting norm is the Decree<sup>84</sup> of September 1951 concerning maritime navigation under the flag of the S.C.V., which arose mainly to affirm the sovereignty of the Vatican State in the context of the “Barcelona Declaration” of 1921 on the rights of states without access to the sea. Law n. CCVI on civil legal persons,<sup>85</sup> the Law n. CLXXXVII on the regulation of voluntary activities,<sup>86</sup> the Law n. CCCLXXII on rights in judicial, secretarial, and notarial matters<sup>87</sup>, and Law n. CXLIV on pecuniary penalties and the legislation of road legislation.<sup>88</sup>

With regard to administrative regulations, art. 12 Lf lists a set of subjects in which the Vatican system directly transposes the Italian legislation in force at the time of the entry into force of the law itself, “including the regulations and treaties ratified by Italy and the implementing norms of the same treaties.” The subjects are as follows: “1) weights and measures of all kinds; 2) invention patents and trademarks and factory patents; 3) railways; 4) post offices; 5) telecommunications and related services, both on fixed and mobile networks, in their various components; 6) the transmission of electricity; 7) aviation; 8) cars and their circulation; 9) the defense against infectious and contagious diseases” (art. 12, 1°, a Lf).

Likewise, the Vatican State transposes the Italian legislation on building and urban police, hygiene and public health, proceeding both from the laws of the Italian State, with the relative general and special regulations, as well as the regulations on matters of the Lazio Region, of the Province and the Municipality of Rome (art. 12, 1°, b Lf). Also, in this case the criteria chosen

<sup>82</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CXCVII of 01.IX.2017, in *AAS Suppl.*, 88 (2017), 121-124.

<sup>83</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. XII, of 12.I.1960, in *AAS Suppl.*, 32 (1960), 45-46.

<sup>84</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. LXVII, of 15.IX.1951, in *AAS Suppl.*, 22 (1951), 69-74.

<sup>85</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCVI, of 28.VI.1993, in *AAS*, 66 (1993), 37-38.

<sup>86</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CLXXXVII, of 22.V.1992, in *AAS Suppl.*, 63 (1992), 21-24.

<sup>87</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCCLXXII, of 28.XII.2001, in *AAS Suppl.*, 72 (2001), 131-140.

<sup>88</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CXLIV, of 15-VI.1989, in *AAS Suppl.*, 60 (1989), 27-29.

are the same and the norms always refer to the administrative legislation in force in Italy at the time of the promulgation of the Law on sources, subject to the same reservations indicated by art. 3 Lf.

## 6 — *Financial Legislation*

The incorporation of the Holy See to the European Monetary Convention in December 2009 and the Monetary Convention between the European Union and the S.C.V.<sup>89</sup> committed the Holy See to adopt a series of legislative measures listed in an Annex, which had to be complied with before 31 December 2010 regarding, above all, the prevention of money laundering, fraud, counterfeiting of currency, etc. In fact, on 30 December 2010 a first series of legislative provisions was promulgated consisting of the *motu proprio La Sede Apostolica*<sup>90</sup> and four other laws of the Pontifical Commission for the S.C.V. The main norm was Law CXXVII concerning the prevention and countering of money laundering and the financing of terrorism,<sup>91</sup> which was subsequently updated several times and finally completely replaced by Law n. CLXVI<sup>92</sup> and then also by Law XVIII. At the same time as the pontifical document, Law n. CXXVIII was promulgated *on fraud and counterfeiting of euro banknotes and currency*, partially amended in 2013.<sup>93</sup> This *motu proprio* of Benedict XVI gave these laws the ability to extend the scope of application to the entire Holy See and entrusted the courts of the S.C.V. with the exercise of criminal jurisdiction in the new matters typified by the law. In addition, the *motu proprio* established the Financial Information Authority (AIF) by approving its first Statutes, an institution renamed years later as the Supervisory and Financial Information Authority (ASIF) with new Statutes.<sup>94</sup>

<sup>89</sup> Cf. *Convenzione Monetaria tra l'Unione Europea e lo Stato della Città del Vaticano*, 17.XII.2009, cit.

<sup>90</sup> Cf. POPE BENEDICT XVI, *Motu proprio La Sede Apostolica*, of 30.12.2010, in AAS, 103 (2011), 7-8.

<sup>91</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CXXVII, of 30.XII.2010, in AAS *Suppl.*, 81 (2010), 167-201.

<sup>92</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CLXVI, of 24.IV.2012, AAS *Suppl.*, 83 (2012), 25-74.

<sup>93</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CXXVIII, of 30.XII.2010, AAS *Suppl.*, 81 (2010), 203-213, modified by Law n. XXIX. Of 13.XII.2013, AAS *Suppl.*, 84 (2013), 437-444.

<sup>94</sup> Cf. POPE FRANCIS, *Chirograph Statute ASIF*, of 5-XII.2020, in *Comm*, 52 (2020), 354-363.



With the inauguration of the Pontificate of Francis, the *motu proprio on the promotion of development* of 8 August 2013<sup>95</sup> introduced new initiatives concerning the prevention and fight against money laundering and the financing of terrorism. At the same time, the Pontifical Commission S.C.V. promulgated Law n. XVIII containing rules on transparency, supervision, and financial information.<sup>96</sup> This provision constitutes the link between the civil penal provisions of the State and those of financial control in the entire sphere of the Holy See. Two more recent legal provisions have been added to these norms: Law n. CCLVII containing norms on market abuse<sup>97</sup> and the Decree n. CCLXXVII containing urgent provisions on property prevention measures.<sup>98</sup>

In economic matters and with regard to the entire scope of the Apostolic See—the Vatican State and the Roman Curia and related institutions—two norms were adopted concerning public bargaining, promulgated with the *motu proprio La diligenza del buon padre*, of 19 May 2020. These were: Regulations on the transparency, control, and competition of public contracts of the Holy See and of the Vatican City State<sup>99</sup> and the Norms for Judicial Protection on the transparency, control, and competition of public contracts of the Holy See and of the Vatican City State.<sup>100</sup>

## 7 — Supervisory and Control Bodies Common to the Holy See

The reform of the structures making up the central organization of the Church has led to the creation of new entities called to act both in the context of the Roman Curia and in that of the Vatican City State. Some of these

<sup>95</sup> Cf. POPE FRANCIS, m.p. *La promozione dello sviluppo*, of 8.VIII.2013, in AAS, 105 (2013), 811-813.

<sup>96</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. XVIII, of 8-X.2013, in AAS *Suppl.*, 84 (2013), 233-296; modified by Law n. CCXLVII, of 19.VI.2018, AAS *Suppl.*, 89 (2018), 89-101; modified by Decree n. CCCLXXII, of 9.X.2020, in *OR*, 10.X.2020, 2-4.

<sup>97</sup> Cf. PONTIFICAL COMMISSION FOR THE S.C.V., Law n. CCLVII, of 28.IX.2018, in AAS *Suppl.*, 89 (2018), 141-153.

<sup>98</sup> Cf. PRESIDENT OF THE PONTIFICAL COMMISSION FOR THE S.C.V., Decree n. CCLXXVII, of 10.XII.2018, in AAS, 89 (2018), 245-250.

<sup>99</sup> Cf. POPE FRANCIS, m.p., *Norme sulla trasparenza, il controllo e la concorrenza dei contratti pubblici della Santa Sede e dello Stato della Città del Vaticano*, of 19.V.2020, in *Comm*, 52 (2020), 24-65.

<sup>100</sup> Cf. POPE FRANCIS, m.p. *Tutela giurisdizionale in materia di trasparenza, controllo e concorrenza dei contratti pubblici della Santa Sede e dello Stato Città del Vaticano*, of 19.V.2020, in *Comm*, 52 (2020), 66-71.

bodies are part of the Roman Curia (for example the ULSA) or are connected to it as an entity with autonomous subjectivity (as is the case of the ASIF). They also exercise their functions within the Vatican City State.

The main result of the investigations launched by Pope Francis in 2013 to report on the financial performance of the bodies of the Roman Curia was the promulgation of the *motu proprio Fidelis dispensator et prudens* of 24 February 2014,<sup>101</sup> with which three new bodies were established to verify the good administration and adequate control of its ecclesiastical patrimony, and with functions both within the Roman Curia and the Vatican City State: the Council for the Economy, the Secretariat for the Economy, and the Office of the Auditor General. Each of the three new bodies was endowed the following year with its own Statute issued *motu proprio* by the Pope and then promulgated on 22 February 2015.

The Council for the Economy thus appears to be the body of the Holy See which is responsible for supervising the administrative and financial activities of all the dicasteries and the remaining administrations, in some way linked to the Holy See, including—but with juridical modalities, however, in some different ways—those headed by the Vatican City State.<sup>102</sup> The Secretariat for the Economy, according to the institutive *motu proprio*, is the department responsible for supervising the entities of the Holy See in economic matters.<sup>103</sup> Finally, the office of the Auditor General undertakes the audit of the administrations of the Holy See, including those of the Vatican State, with ample powers of inquiry and with a certain independence of action. The original Statutes of the Office of the Auditor General were replaced in 2019.<sup>104</sup>

More recently, another entity has been set up for the special control of confidential matters. This was following the extension of pontifical secrecy to economic and financial matters concerning the Holy See and the need to identify a body that would determine it in individual cases and at the same time provide for the control of financial operations of a confidential nature. The Commission on Confidential Matters was thus established, for the entire sphere of the Holy See, by means of a *motu proprio La Commissione*, which came into force on 1 October 2020.<sup>105</sup>

<sup>101</sup> Cf. POPE FRANCIS, m.p. *Fidelis dispensator et prudens*, of 24.II.2014, in AAS, 106 (2014), 164-165.

<sup>102</sup> Cf. POPE FRANCIS, *Motu proprio, Statuto del Consiglio per l'Economia*, of 22.II.2015, in *Comm*, 47 (2015), 25-31.

<sup>103</sup> Cf. POPE FRANCIS, m.p., *Statuto della Segreteria per l'Economia*, of 22.II.2015, in *Comm*, 47 (2015), 32-39.

<sup>104</sup> Cf. POPE FRANCIS, m.p., *Statuto dell'Ufficio del Revisore Generale*, 21.I.2019, 2015, in *Comm*, 51 (2019), 40-46.

<sup>105</sup> Cf. POPE FRANCIS, m.p., *La Commissione*, s.d. 2015, in *Comm*, 52 (2020), 344-345.

## THE MINISTRY OF SPONSORSHIP AND ITS DUTY OF ACCOUNTABILITY

ANNE ASSELIN

**SUMMARY** — For centuries, Catholic healthcare institutions were owned and operated by religious institutes, ensuring the Catholic identity of their works. In recent times, through the institution of the public juridic person, the ownership and sponsorship of these ministries have progressively been entrusted to lay boards. As sponsorship has evolved in the past thirty years, so has the recognition that the lay person who moves into sponsorship is answering a call to a ministry fulfilled in the name of the Church. With this responsibility comes an obligation for accountability—to the Church but also to the sponsored ministries. This article looks at the evolution of sponsorship in its various models, the canonical institution of the ministerial juridic person, and the sponsor’s duty of accountability.

**RÉSUMÉ** — Il y a quelques siècles, les institutions catholiques de soins de santé étaient possédées et dirigées par des instituts religieux, assurant ainsi l’identité catholique de leurs œuvres. En ces temps plus récents, par l’institution de la personne juridique publique, la propriété et le parrainage de ces ministères ont progressivement été confiés à des conseils de laïcs. Le parrainage a évolué dans les trente dernières années et il en est de même pour la reconnaissance que le laïc qui s’engage dans le parrainage répond à l’appel à un ministère accompli au nom de l’Église. Cette responsabilité est accompagnée de l’obligation de rendre des comptes – aux autorités ecclésiales mais aussi aux ministères parrainés. Cet article fait un retour sur l’évolution du parrainage par ses différents modèles, l’institution canonique de la personne ministérielle juridique et le devoir de reddition de comptes de la société de parrainage.

### *Introduction*

Many years ago, on my first day in a position I was taking over from someone who had moved up in the ranks of the organization, I was greeted by a kind person who started off by telling me: “You know, you have big

shoes to fill.” I immediately felt like the little girl who would walk around the house in my mother’s high-heeled shoes, wanting to be bigger than I was and having a very hard time remaining upright. It was a daunting prospect and probably one that many people have had in their lives. Many years later, at the urging of Father Francis Morrissey, O.M.I., I was invited to join the Catholic Health Sponsors of Ontario. As I became initiated to the work of a sponsor, I was reminded of that warning I had once received. As a lay person, being introduced to the ministry of sponsorship in health care, following in the footsteps of the sisters who had founded hospitals and care homes was daunting indeed, very “big shoes to fill.” But as I slowly became more familiar with the wonderful world of sponsorship, I remembered the words of Father Morrissey, back in 2019, on the occasion of his acceptance of the Life Achievement Award given to him by the Catholic Health Association of the United States. He was recalling how he came to acquire a few guiding principles as he grew in his own priestly ministry: “Do not be afraid. There is a tomorrow although we have no idea what it will hold. Do your utmost to be involved in shaping tomorrow which will soon be here.”<sup>1</sup>

Doing the utmost to shape tomorrow was definitely one of the purposes that inspired many founders and foundresses of institutes of consecrated life, revealing the particular charism that would guide their community in its mission for many years. These missions were often treacherous and fraught with great difficulties, travels over dangerous terrains, setting foot in communities that were not always welcoming or even openly anti-Catholic. They worked for the poor and the vulnerable, the abandoned children, the sick, and the forgotten. They founded and managed hospitals, orphanages, shelters, schools and colleges, and built a healthcare system based on Gospel values, ministering to everyone who came through their doors. They set up corporations, ran boards, made land deals, all the while “flying under the radar,” striving not to bring attention to themselves so as to preserve their freedom to do what needed to be done. They developed the skills they required to get the job done by training their own nurses.<sup>2</sup> They did what had

<sup>1</sup> CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES (CHA), Lifetime Achievement Awards, <https://www.chausa.org/assembly-2019/awards/lifetime-achievement-award> (15 March 2021).

<sup>2</sup> In fact, between the 17<sup>th</sup> and 20<sup>th</sup> centuries, 50 congregations of religious built 278 hospitals and 143 long term care facilities in Canada, three of which were established by religious congregations of men (see K. MOYNIHAN, documentary “*Say Little, Do Much.*” *The Story of Women Religious in Health Care in Canada*, Halifax, NS, KM Productions, 2020, [http://www.chac.ca/about/history/books/other/Ontario%20Sponsorship\\_MacLellan%202017%20.pdf](http://www.chac.ca/about/history/books/other/Ontario%20Sponsorship_MacLellan%202017%20.pdf) [15 March 2021] [= MOYNIHAN, “*Say Little, Do Much*”]; see also S. NELSON, *Say Little, Do Much: Nursing, Nuns, and Hospitals in the Nineteenth Century*, Philadelphia, PA,

to be done, in response to the needs of the time, often with great sacrifices. One need only recall that, in Canada, during the Great Depression years, many hospitals had to close because people could not afford the fees; Catholic hospitals, on the other hand, remained in service, partly because the sisters relinquished their salary and delayed personal services for their community in order to keep the hospitals running.<sup>3</sup>

Although recent times have brought to light some upsetting chapters in this otherwise glorious history, the legacy that has been left by religious communities is nothing short of a treasure. And, as all treasures ought to be preserved for the benefit of present and future generations, keeping alive the charism and legacy of founding congregations is a duty that must be undertaken with steady commitment.

In the 1970s, as members of religious institutes began to diminish in numbers and focused their attention on other priorities, it was clear to them that they wished their ministries to continue and to flourish. This was when the notion of *sponsorship* began to evolve, this “structured relationship through which the sponsor, in the name of the Church, so publicly entrusted by the Church to minister, directs and influences a ministry that meets an apostolic need and furthers the mission of Jesus.”<sup>4</sup> It can also be defined as “a formal relationship between a recognized Catholic organization and a legally formed entity entered into for the sake of promoting and sustaining the Church’s mission in the world.”<sup>5</sup> Its origin can be congregational or diocesan, and the relationship it is called to nurture is multi-directional—with the Church, with the board, with the sponsored organizations, with governmental authorities, and with the community.

As I have been fortunate enough to become involved in the wonderful work of sponsorship, in this article, I wish to highlight its evolution, the effect the canonical institution of the public juridic person has had on sponsorship, and, as such, its obligation for accountability within the Church and

University of Pennsylvania Press, 2001). “Say Little, Do Much” is a quote attributed to Saint Vincent de Paul as he urged the religious congregation he had founded, the Daughters of Charity of Saint Vincent de Paul, to leave their cloisters and go out to care for the poor and the most vulnerable.

<sup>3</sup> See remarks by H.E. MACDONALD, Dean of the Faculty of Arts, University of New Brunswick (Saint John), in MOYNIHAN, “*Say Little, Do Much*.”

<sup>4</sup> CHA, definition provided by C. BOUCHARD, in the context of the webinar series, “Sponsorship: Sustaining the Ministry, Session One—Theology, Ministry, and Sponsorship,” 12 August 2020 (restricted access) (= BOUCHARD, “Theology, Ministry, and Sponsorship”).

<sup>5</sup> F.G. MORRISEY, “Various Types of Sponsorship,” in R. SMITH, W. BROWN and N. REYNOLDS (eds.), *Sponsorship in the United States Context. Theory and Praxis*, Alexandria, VA, Canon Law Society of America, 2006 (= SMITH et al., *Sponsorship in the United States Context*), 19.

among its works. As my experience has been with congregational sponsorship, it will be the focus of this article although both forms share many aspects.

## 1 — *The Evolution of Sponsorship*

We often think that sponsorship is a fairly recent development in the Church, but it has been a function that was implicitly accomplished by religious institutes in their works of education, health care, and social services. As the sisters owned and directed a hospital or a school, it was recognized as Catholic, a work of the Church.<sup>6</sup> To understand where and what sponsorship is today, let us go back some seventy years or so and follow its evolution. Through the times, there have been “waves of sponsorship” as it has developed and undergone structural shifts, a dynamic process seeking to adjust to the changes of the time, very much like the sisters were in a constant quest to respond to changing needs.<sup>7</sup> These “waves of sponsorship” can be understood by following the evolving models of Catholic healthcare sponsorship.

### 1.1 — The Family Business Model

If we go back to the 1950s and 1960s, Catholic sisters and brothers were the owners, the administrators and, quite often, the practitioners of Catholic institutions, most often named after the religious institute. They had “direct dominium over the property”<sup>8</sup> and operated it like a family business – the religious owned it and were directly involved in leading and managing it—from the administrator’s office to the bedside or the classroom. They were the “sponsors.” They owned and governed the institution, so the “business” was in their name. Privileged information pertaining to the institution was

<sup>6</sup> See CHA, *Guide for Sponsors in Catholic Health Care: An Explanation of Purpose, Qualifications and Competencies*, Washington, DC/St. Louis, MO, CHA, 2021 (= CHA, *Guide for Sponsors in Catholic Health Care*), 3. This Guide was dedicated to the memory of Fr. Francis Morrissey, O.M.I., and much of its content originates from his work.

<sup>7</sup> This section borrows from a presentation made by L. ASHMORE-RUPPEL, in the context of the CHA webinar, “Sponsorship: Sustaining the Ministry, Session Two—Evolution of Sponsorship,” CHA, 9 September 2020 (= ASHMORE-RUPPEL, “Evolution of Sponsorship”), which was partially based on a work by M.K. GRANT and P.P. VANDENBERG, *After We’re Gone: Creating Sustainable Sponsorship*, Mishawaka, IN, Ministry Development Resources, 1998.

<sup>8</sup> MORRISSEY, “Various Type of Sponsorship,” 17.

shared with the religious institute. The succession plan was assured. The *family*, from generation to generation, was the decision-maker and the inspiration behind the mission, its vision, and its values.

For these religious institutes, their works and institutions were their ministry, “an expression of the works of mercy at the heart of the Gospel message.”<sup>9</sup> The institution and the founding religious institute were so interwoven that the mere presence of the sisters and brothers was sufficient to ensure the Catholic identity of the institution and its direct relationship with the Church.<sup>10</sup> The charism of the religious institute shone through the very fiber of their works and institutions, as seen in the *Constitutions* of the Sisters of Mercy: “As Sisters of Mercy, we sponsor institutions to address our enduring concerns and to witness to Christ’s mission. Within these institutions, we, together with our co-workers and those we serve, endeavor to *model mercy and justice and to promote systemic change* [...]”<sup>11</sup> By the mere fact of their association or employment, those who participated in the works of women and men religious were inspired by the founding charism.

Eventually, however, this model had to evolve, as do most family businesses. Health care was becoming more complex, and the sisters saw the need to expand the pool of expertise to include other people who wanted to serve.

## 1.2 — The Franchise Model

As the need for skill sets beyond the walls of the religious congregation became more pressing, the Second Vatican Council was calling religious to renewal. In *Perfectae caritatis*, the Council asked religious institutes to adapt to changing circumstances by returning to their sources—Christ and the authentic charism of their founders. It emphasized that consecrated life is ordered to a free and total dedication to God but also to “the building up of the Church and to the salvation of the world” (*PC* 5; *LG* 44; c. 573 § 1). Its ecclesial dimension was emphasized: “The communities for which these norms of appropriate renewal are decreed should react with a willing spirit to their divine calling and their contemporary mission in the Church” (*PC* 25). Hence, religious were encouraged to invite the laity to share in their mission.

<sup>9</sup> H.M. BURNS, “Reflections on Sponsorship: One Congregation’s Perspective,” in SMITH et al., *Sponsorship in the United States Context*, 4.

<sup>10</sup> See F.G. MORRISEY, “Our Sponsors: Yesterday, Today, and Tomorrow,” in *Health Progress*, July-August 2013 (= MORRISEY, “Our Sponsors: Yesterday, Today, and Tomorrow”), 58.

<sup>11</sup> *Constitutions*, Sisters of Mercy, no. 5 (emphasis added), as quoted in BURNS, “Reflections on Sponsorship,” 5.

As religious were called to a reorientation of their life, ordered to the sanctification of the Church, the dogmatic constitution on the Church *Lumen gentium* encouraged the laity to a fuller participation in the mission of the Church (LG 33). Lay persons were called to apostolic activity, rooted in their baptismal calling: “The laity derive with respect to the apostolate from their union with Christ their Head” (AA 3).

This conciliar call to a synergistic relationship between religious and laity coincided with a decline in numbers of religious and gave rise naturally to the call to the laity to serve in ministry with the sisters. The sisters still had the “business,” and the laity served with them. Gradually, as the sisters began stepping back from leadership, they invited more lay persons into senior management, involving them in decision-making processes, and placing them on some leadership and advisory boards. Sponsorship shifted towards a board of directors rather than the direct delivery of services, to lay rather than a religious leadership.<sup>12</sup> The sisters and brothers were still sponsoring the organizations, but the leadership, governance, and sponsorship roles were more distinct.

At the same time, health care was transferred to a publicly funded system, requiring an understanding of complex financial operations and state governmental regulations, policies, and procedures. The advent of publicly funded health care also meant that the sisters’ support was less needed, “and that wasn’t a negative thing for them. They felt they had gotten people to this stage—a couple of hundred years of service—and now, if lay persons could be paid properly, if there was enough money to actually run a hospital, they didn’t mind stepping back.”<sup>13</sup> They acknowledged that lay persons may be more skilled for multi-faceted governance responsibilities and that their own resources would be better directed to sponsorship itself. The sisters saw these happenings as opportunities to answer the conciliar call for them to invite the laity to participate in the mission of the Church.

As laity became increasingly involved in advisory boards, the sisters recognized that the boards had no significant legal responsibility for the ministry and thus created boards with fiduciary power. The sisters thus became the “members,” reserving some powers to themselves and delegating some authority to the boards. The “reserved powers” pertained to “high level”

<sup>12</sup> See MORRISEY, “Various Types of Sponsorship,” 23; see also id., “Our Sponsors: Yesterday, Today and Tomorrow,” 58. Statistics show that, in 1968, out of 796 CEOs of Catholic health care institutions in the US, 770 were religious and 25 were lay persons. In 2020, there were 660 lay CEOs and no religious (see ASHMORE-RUPPEL, “Evolution of Sponsorship”; CHA chart on Lay Leadership, as shown in the referenced webinar).

<sup>13</sup> MACDONALD, in MOYNIHAN, “Say Little, Do Much.”



decisions—the appointment and removal of members; the approval of changes in the purpose, philosophy, and mission; the approval of changes in the canonical statutes for submission to the ecclesiastical authority which granted public juridic person (PJP) status; the admission of new participating congregations or other PJPs; the approval for the suppression of the PJP to be submitted to the competent ecclesiastical authority.<sup>14</sup> The board of directors handled day-to-day governance.<sup>15</sup> Eventually, as the sisters became more comfortable with lay boards, they reduced the number of reserved powers, focusing on core documents; appointments of the chief executive officer (CEO) and board directors; and alienation, mortgages, and bond issues.<sup>16</sup>

In the early 1970s, faced with increased expenses and reduced resources, the sisters began to realize that Catholic healthcare institutions all operating independently were counter-productive. This gave way to a new model of sponsorship.

### 1.3 — The Partnership Model

In a desire to upgrade their hospitals and have them operate more efficiently, religious congregations decided to combine efforts with each other to bring their organizations together and sponsor them as one. This evolved into a partnership of Catholic health systems. For example, in 1976, the seventeen hospitals in Michigan, Iowa, and Indiana sponsored by the Sisters of Mercy joined to form the Sisters of Mercy Health Corporation (Detroit). Two years later, they had their first gathering of sisters and partners in ministry across the entire province.<sup>17</sup>

The next step was for religious communities to combine forces with each other to sponsor their works jointly and operate as an inter-congregational system. The sisters of one religious community would exercise reserved powers for the institutions they owned, distinctly from those owned by other congregations. Eventually, those powers would be delegated jointly to a new

<sup>14</sup> See CHA, *A Guide to Understanding Public Juridic Persons in the Catholic Health Ministry*, Washington, DC/St. Louis, MO, Catholic Health Association of the United States, 2012 (= CHA, *A Guide to Understanding Public Juridic Persons*), 68.

<sup>15</sup> See MORRISEY, “Various Types of Sponsorship,” 24; C. BOUCHARD, CHA webinar “Sponsorship: Sustaining the Ministry, Session Two—Evolution of Sponsorship” (= BOUCHARD, “Evolution of Sponsorship”).

<sup>16</sup> See MORRISEY, “Our Sponsors: Yesterday, Today and Tomorrow,” 58.

<sup>17</sup> See SISTERS OF MERCY, “Significant Dates in the History of the Sisters of Mercy, Midwest Community,” <https://www.sistersofmercy.org/files/images/west-midwest/history/WMW-timeline-web.pdf> (29 March 2021).

board representing joint sponsors.<sup>18</sup> One example of such a consolidation is Trinity Health, a US national Catholic health system. In 1979, the Congregation of the Sisters of the Holy Cross formed Holy Cross Health System, “to bring unity as well as economic and professional solidarity” to their sponsored healthcare organizations. On another front, in 1976, the Sisters of Mercy created Mercy Health Services to link their own hospitals. In this vein, in 1998, another Catholic health system was being formed by twelve original religious sponsors to combine their apostolates legally and operationally—the Franciscan Sisters of Allegany Health System, Eastern Mercy Health System, and the Sisters of Providence Health System—to form Catholic Health East. Finally, Trinity Health was formed in 2013 by joining Mercy Health Services and Catholic Health East, each bringing their own traditions and charisms to this unified ministry.<sup>19</sup>

To appreciate the evolution of these Catholic health systems in the United States, in 1968 there were 796 free-standing Catholic hospitals and no Catholic systems. In 2020, there are 668 Catholic hospitals, 590 of which are in a Catholic system. There are forty-two different Catholic systems.<sup>20</sup>

#### 1.4 — The Ministerial Juridic Person Model

In the 1990s, because of the decreasing number of religious and the increasing complexity of healthcare systems, and with the advent of the 1983 *Code of Canon Law*, the entity of the public juridic person has been widely used for sponsorship purposes. The PJP assumes the sponsorship responsibilities previously carried out by a religious institute or by a diocese. In some cases, the PJP also assumes ownership of the institution; in other cases, ownership is retained by the religious institute or diocese.<sup>21</sup> Additionally, certain dioceses expressed a desire to partner with religious congregations in a Catholic system, mostly in the case of charitable activities and subsidized or long-term housing. New corporations—juridic persons—were created to assume sponsorship of these joint works. Quite often it became clear that a higher authority was needed to grant canonical recognition, as the works extended over more than one diocese, and pontifical PJP’s were created.<sup>22</sup>

<sup>18</sup> See MORRISEY, “Various Types of Sponsorship,” 25.

<sup>19</sup> See TRINITY HEALTH, “History,” <https://www.trinity-health.org/about-us/history> (29 March 2021).

<sup>20</sup> Data provided by BOUCHARD, “Evolution of Sponsorship.”

<sup>21</sup> See CHA, *A Guide to Understanding Public Juridic Persons*, 10.

<sup>22</sup> See MORRISEY, “Our Sponsors: Yesterday, Today and Tomorrow,” 58-59.

The term Ministerial Juridic Person (MJP) is favoured in Catholic health-care sponsorship to better reflect the fact that it represents a shift of responsibility for Catholic ministries from religious to lay people. It is not only a canonical entity but a ministerial entity. MJPs are one of the biggest evolutions to come from the Second Vatican Council in response to the call to laity to participate actively in the mission of the Church.

## ***2 — The MJP: A Canonical Institute and a Ministry***

Canon 113 §2 explains that juridic persons are “subjects in canon law of obligations and rights which correspond to their nature.” Canon 114 elaborates on their purpose, which must be “in keeping with the mission of the Church” and transcend “the purpose of individuals,” such as works of piety, the apostolate, and charity. These canons make clear that, although juridic persons are “artificial persons,” often compared to civil corporations, they are different because they are connected to the mission of the Church. They are a canonical structure ordered to the ownership and governance of property, but these actions must always be for the greater good of the mission and the ministry.

### **2.1 — The Juridic Person and Sponsorship**

Although many non-canonists are familiar with juridic persons, their application in the world of sponsorship is less widely known. Religious institutes, provinces, and houses are juridic persons by law and, as such, can acquire, possess, administer, and alienate temporal goods (c. 634 § 1). Since their temporal goods are ecclesiastical, they are governed by Book V of the *Code of Canon Law* and by their own norms on the administration of goods (c. 635). As PJs, “they fulfill in the name of the Church, according to the norms of the prescripts of the law, the proper function entrusted to them in view of the public good” (c. 116 § 1).

In a 1970 general audience, Pope Paul VI explained the call of the Second Vatican Council to the personal and ecclesial virtue of poverty and offered sound economic advice, that the need for material means or assets, and their corresponding duties for acquiring and administering them, should never exceed the ends they must serve and from which they should sense restraining limitations, the generosity of the investment, and the spiritual significance.<sup>23</sup>

<sup>23</sup> See PAUL VI, General Audience, 24 June 1970, [http://www.vatican.va/content/paul-vi/it/audiences/1970/documents/hf\\_p-vi\\_aud\\_19700624.html](http://www.vatican.va/content/paul-vi/it/audiences/1970/documents/hf_p-vi_aud_19700624.html) (6 April 2021).

More recently, the ends to which assets of religious institutes should be directed were clearly expounded: “In fact, the assets of the institutes contribute to the ‘same evangelical goals for promoting the human person, for mission, for charitable sharing, and for solidarity with the people of God: in particular a common lived commitment to care and have concern for the poor is capable of giving new life to the institute’.”<sup>24</sup>

Religious institutes have long been guided by these principles and their founding charisms when responding to the needs and challenges of the times. Pope Francis has made it clear that the mission of temporal goods to address the care of the needy is not only that of religious institutes: “As the faithful and prudent administrator has a vocation to care attentively for those goods that have been entrusted to him, so the Church is conscious of her call to safeguard and carefully administer her goods in light of her mission of evangelization, with special care for the needy.”<sup>25</sup> These ends are to be pursued by any person or group of persons entrusted with the administration of ecclesial goods. Sponsors who have the responsibility for actions required by canon law and civil law on behalf of ministries are to be guided by these same principles.

When sponsorship of religious ministries was solely in the hands of the religious institute who owned the ministry, these greater goals and communion with the Church were entrenched within the very nature of the institute. The requirements of canon law were fulfilled by the PJP and those of civil law, through the corresponding civil entity. The relationship between the two entities “was often expressed in the corporate documents in the form of reserved powers, usually to approve the philosophy and mission of the apostolate, to appoint members, to amend articles of incorporation and bylaws, to approve acquisitions, mergers and dissolutions, to approve indebtedness and mortgaging of property, and in some cases to approve the appointment of the chief executive officer.”<sup>26</sup>

<sup>24</sup> CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE (CICLSAL), *Economy at the Service of Charism and Mission. Guidelines*, Libreria editrice vaticana, 2018, 29, citing *Guidelines. New Wine in New Wineskins. The Consecrated Life and Its Ongoing Challenges since Vatican II*, Libreria editrice vaticana, 6 January, 2017, 28.

<sup>25</sup> FRANCIS, motu proprio on establishing a new coordinating agency for the economic and administrative affairs of the Holy See and the Vatican City State *Fidelis dispensator et prudens*, 24 February 2014, in AAS, 106 (2014), 164, English translation at [https://www.vatican.va/content/francesco/en/motu\\_proprio/documents/papa-francesco-motu-proprio\\_20140224\\_fidelis-dispensator-et-prudens.html](https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20140224_fidelis-dispensator-et-prudens.html) (6 April 2021).

<sup>26</sup> CHA, *A Guide to Understanding Public Juridic Persons*, 54.

Over time, sponsorship has taken on various models of interaction between the MJP and the corresponding civil corporation. In an effort to explain these structures, CHA developed an overview of the different models of sponsorship: congregational (or traditional), diocesan, distinct, mirror, and hybrid. In each model, the relationship between the sponsoring board and the governing board is unique. The division and overlap of responsibilities between these two bodies can vary widely and, consequently, so does the interaction between the ministry's religious members and the lay people.<sup>27</sup>

### 2.1.1 — *Congregational*

This sponsorship model is also called the *traditional* model. For many years, this was the only model of sponsorship, in which a religious institute or a group of religious institutes was the official sponsor of a Church work. There is no need for the establishment of a new PJP (or MJP) since the religious institute already is a PJP and recognized by the Church.

One example of this model is Christus Health System, headquartered in Arkansas and New Mexico. Its affiliates and related entities are located in many cities in the United States, Mexico, Chile, and Columbia. As this system operates internationally and the language of sponsorship and PJPs is not widely known by the episcopal conferences of Latin America, Christus Health has elected to retain the traditional model of sponsorship. Therefore, the nature of its ministry is closely tied to the active presence of the religious institute. Christus Health is co-sponsored by the Sisters of Charity of the Incarnate Word of Houston, the Sisters of Charity of the Incarnate Word of San Antonio, and the Sisters of the Holy Family of Nazareth. These congregations still have several younger sisters with governance experience. Most of the sisters who serve as board members are not healthcare professionals but see this service as a ministry. The leadership teams of the three congregations appoint the sisters who serve on the Christus Health Member Board. Although the Member Board does not have a voice on the System Board, it exercises the usual reserved powers and does have an influence on decisions made at the level of the System Board.

<sup>27</sup> See CHA, *Guide for Sponsors in Catholic Health Care*, 9. These models were presented during the CHA webinar, "Sponsorship: Sustaining the Ministry, Session Three—Models of Sponsorship," 14 October 2020 (restricted access). The presenters of the various models were, respectively, Sr. Teresa Maya, CCVI, Congregational Leader for the Sisters of Charity of the Incarnate World, Christus Health System; Sr. Jean Rhoads, DC, Chairperson, Ascension Sponsor; Ron Hamel, Member, SSM Health Ministries; and Larry Warren, Board Vice-Chairperson, Trinity Health.

### 2.1.2 — *Diocesan*

In the *diocesan* model, a diocese (which is already a PJP) serves as sponsor of an educational or healthcare ministry. Examples of this model include health services sponsored by the Diocese of Buffalo and Catholic Health Services of Long Island, which is sponsored by the Diocese of Rockville Center.

### 2.1.3 — *Distinct*

In the *distinct* model, a new MJP is established as sponsor, distinct from the governing board of the civil corporation. Sponsoring members do not serve on the governing body of the civil corporation.

An example of this model is Ascension Health, headquartered in St. Louis, Missouri, in which five congregations joined their ministries to form an MJP in 2011. There are three sisters and five lay persons on the Ascension Sponsor Board; they always leave a place for a sixth participant to indicate they remain open to new entities joining the MJP. The founding congregations have representatives on the Sponsor Board without term limits, which ensures the charisms continue. They also have the authority to approve the members of the Sponsor Board; the Sponsor Board appoints the Chair and members of Ascension Board; and the Ascension Board appoints the CEO. Members of the Sponsor Board are all Catholics, who must understand the call and the teaching, mission, and ethics of the Church and have the ability to discern. It is important that all members understand that their work is a ministry of the Church. The Sponsor and Ascension Board meet at least twice a year, have a retreat together every other year, and the Board Chair issues regular reports to the Sponsor.

### 2.1.4 — *Mirror*

In the *mirror* model, a new MJP is established, consisting of the same people who are on the governing board of the civil corporation. The members serve in both capacities, assuming the civil and canonical responsibilities both as sponsors of the ministry and directors of the civil board.

An example of this model is Trinity Health, a large multi-institutional Catholic healthcare system based in Livonia, Michigan. It saw the day when the congregations of the Sisters of the Holy Cross and the Sisters of Mercy of the Americas consolidated their respective health systems and transferred sponsorship to a canonical PJP, approved in 2010 by the Congregation for

Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL). Following this, Holy Cross Health System and Mercy Health Services joined to become Trinity Health. The mirror board acts as a sponsor for Catholic Health Ministries, the self-perpetuating MJP, and as members of Trinity Health's civil board. The appointment of the civil board

... is contingent upon membership in Catholic Health Ministries [...] and this was a watershed moment in Trinity Health's governance. Although "working with the sisters" had been cited consistently as the most inspiring feature of serving on the Trinity Health board, few lay board members thought they could do the sisters' work. For the traditional board members, the sisters not only interpreted the church (the Holy See, canon law, PJPs, the Ethical and Religious Directives for Catholic Health Care Services, etc.), they communicated the Gospel — in both words and action. They viewed the sisters as the religious authority and the moral voice in board deliberations. Now the sisters expected those serving on the board to assume the compelling responsibilities of the sisters' ministry.<sup>28</sup>

### 2.1.5 — Hybrid

In the hybrid model, the canonically established MJP is a distinct sponsoring body whose members also serve on the governing health system board. The board is made up of all members of the sponsoring body, but there are also members who only serve on the health system board of directors.

An example of this model is SSM Health Ministries (Sisters of St. Mary), which is the sponsor of SSM Health, a not-for-profit health system serving communities in the US Midwest. The Franciscan Sisters of Mary transferred sponsorship to a new MJP in 2013, and its board is now composed of three sisters, one cleric, and seven laypeople. The majority must be Catholic, while the others must resonate with Catholic health care. All members of the sponsor sit on the board of directors but not all directors serve as sponsor members. The CEO is an invited guest. The chair of the sponsoring board meets monthly with the CEO and periodically with the chair of the board of directors. The bishops meet with the CEO. Every year, the sponsor sets expectations for the health system management, in line with SSM Health Ministries mission. The sponsor board appoints directors and the chair of the health system board, but not the CEO. The leadership team of the Franciscan Sisters of Mary appoint members to the sponsor board, on their own right or upon recommendation of the sponsor board.

<sup>28</sup> M. DREHER and L. WERTHMAN, "Sponsors and Board Share Canonical Civil Missions," in *Health Progress*, May-June 2017, 50.

Different models have been chosen by various organizations because they best fit their particular identity and needs. Sponsorship boards and system boards or governance boards relate differently to each other depending on the particular model. In some models, the entities work separately but not independently of each other. In others, they are one. But, in all models, the members and directors are cognisant of the need to be of one mind, which is a testament to the fact that Catholic health care is always rooted in its mission and values. The sponsors' role in maintaining the Catholic identity of health-care systems, the fidelity to the mission, the core values of Catholic health care are first and foremost in the minds of board members. Sponsorship is watching over the excellence and sustainability of their organizations, but Catholic sponsorship is more: it is intimately linked to the mission of the Church.

## 2.2 — The Ministry of Sponsorship

The Church's mission is to teach, to sanctify, and to serve God's people. The mission of healing, in the spirit of the Gospel, fits that definition. Since the time of Jesus, Christians have understood that caring for the sick, the poor, and the needy is a calling that must be answered. One need not look further than the parable of the Good Samaritan, the model that has inspired Catholic healthcare providers for years. It was St. John Paul II who invited all those involved in Catholic health care "to fix their gaze on the divine Samaritan, so that their service can become a prefiguration of definitive salvation and a proclamation of new heavens and a new earth 'in which righteousness dwells' (2 Pt 3:13)."<sup>29</sup> A few years later, in his encyclical *Deus caritas est*, Pope Benedict XVI offered the same parable as the model for health care: "Following the example given in the parable of the Good Samaritan, Christian charity is first of all the simple response to immediate needs and specific situations: feeding the hungry, clothing the naked, caring for and healing the sick, visiting those in prison, etc."<sup>30</sup>

Pope Francis has been quite clear that Catholic health care is innately connected to the mission of the Church: "Jesus bestowed upon the Church his healing power. [...] The Church's mission is a response to Jesus' gift, for

<sup>29</sup> JOHN PAUL II, message for the World Day of the Sick 2000, "Contemplate the Face of Christ in the Sick," no. 9, 6 August 1999, [http://www.vatican.va/content/john-paul-ii/en/messages/sick/documents/hf\\_jp-ii\\_mes\\_19990806\\_world-day-of-the-sick-2000.html](http://www.vatican.va/content/john-paul-ii/en/messages/sick/documents/hf_jp-ii_mes_19990806_world-day-of-the-sick-2000.html) (9 April 2021).

<sup>30</sup> BENEDICT XVI, encyclical on Christian love *Deus caritas est*, no. 31, 25 December 2005, in AAS, 98 (2006), 244, English translation at [http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf\\_ben-xvi\\_enc\\_2005\\_1225\\_deus-caritas-est.html](http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_2005_1225_deus-caritas-est.html) (9 April 2021) (= BENEDICT XVI, *Deus caritas est*).



she knows that she must bring to the sick the Lord's own gaze, full of tenderness and compassion. Healthcare ministry will always be a necessary and fundamental task, to be carried out with renewed enthusiasm by all, from parish communities to the largest healthcare institutions. [...] Doctors and nurses, priests, consecrated men and women, volunteers, families and all those who care for the sick, take part in this ecclesial mission."<sup>31</sup>

Health care as a ministry reflects the ecclesiology that all the baptized are called to ministry. As Yves Congar observed: "The Church of God is not built up solely by the actions of the official presbyteral ministry but by a multitude of diverse modes of service, stable or occasional, spontaneous or recognized and [when the occasion arises] consecrated, if not by sacramental ordination. These modes of service already exist. [...] They exist now; but up to now were not called by their true name, *ministries*, nor were their place and status in ecclesiology recognized."<sup>32</sup> It is now recognized that ministries are not limited to the ordained, since ministry is rooted in baptism. To understand the significance of including health care as one of the ministries in the Church, a definition from Thomas O'Meara is helpful: "Christian ministry is the public activity of a baptized follower of Jesus Christ flowing from the Spirit's charism and an individual personality on behalf of a Christian community to witness to, serve and realize the kingdom of God."<sup>33</sup> O'Meara provides six characteristics for ministry: (1) doing something; (2) for the advent of the Kingdom; (3) in public; (4) on behalf of a Christian community; (5) which is a gift received in faith, baptism, and ordination; and which is (6) an activity with its own limits and identity within a diversity of ministerial actions.<sup>34</sup> As Catholic health care conforms to these ministerial characteristics, so does the work of the sponsor, who must ensure "that the mission of Catholic health is carried out, now and in the foreseeable future. A sponsor is a steward, accountable to the Church for the organization's Catholic identity and ministry, as well as the financial health and property ownership."<sup>35</sup>

<sup>31</sup> FRANCIS, message for the World Day of the Sick 2018, "*Mater Ecclesiae: 'Behold, your son... Behold, your mother. And from that hour, the disciple took her into his home'* (Jn 19: 26-27)," [https://www.vatican.va/content/francesco/en/messages/sick/documents/papa-francesco\\_20171126\\_giornata-malato.html](https://www.vatican.va/content/francesco/en/messages/sick/documents/papa-francesco_20171126_giornata-malato.html) (9 April 2021).

<sup>32</sup> Y. CONGAR, "My Path-Findings in the Theology of Laity and Ministries," in *Jur*, 32 (1972), 181.

<sup>33</sup> T. O'MEARA, *Theology of Ministry*, New York, Paulist Press, 1983, 142.

<sup>34</sup> *Ibid.*, 136.

<sup>35</sup> K.S. SMITH, *Overview of Sponsorship. A Supplement to CHA's Sponsorship Video "Go and Do Likewise. Sponsorship of the Catholic Health Ministry"*, CHAUSA, 2014, 4.

What does the concept of sponsorship as ministry mean for sponsorship models in which boards are mostly composed of lay people? Lay people who had the opportunity of working alongside the sisters and the brothers may have been well prepared to take on the leadership of Catholic health organizations, but what does it mean for the future? Will the lay people have the same understanding of the mission and the need to preserve Catholic identity? Are they sufficiently equipped to be called to this ministry and to respond to the call?

### 2.3 — The Call to the Laity

As religious institutes called the laity to take on the responsibility of sponsorship of their ministries, it became increasingly clear that the relationship of sponsorship to the Church and the ministry of Catholic health care had to be emphasized. It is anticipated that members who sit on for-profit boards will establish policies and objectives that answer the expectations of stakeholders. Members who sit on sponsorship boards, although fulfilling the usual responsibilities of other corporate boards, must realize that far more is required of them. “What in many cases was previously seen as a job or simply as a form of employment, is now seen and considered to be a ministry and an apostolic action carried out in the name of Christ.”<sup>36</sup> In his encyclical *Deus caritas est*, Benedict XVI explains what is required for this ministry.

Yet, while professional competence is a primary, fundamental requirement, it is not of itself sufficient. We are dealing with human beings, and human beings always need something more than technically proper care. They need humanity. They need heartfelt concern. Those who work for the Church’s charitable organizations must be distinguished by the fact that they do not merely meet the needs of the moment, but they dedicate themselves to others with heartfelt concern, enabling them to experience the richness of their humanity. Consequently, in addition to their necessary professional training, these charity workers need a “formation of the heart”: they need to be led to that encounter with God in Christ which awakens their love and opens their spirits to others. As a result, love of neighbour will no longer be for them a commandment imposed, so to speak, from without, but a consequence deriving from their faith, a faith which becomes active through love (Gal 5:6).<sup>37</sup>

<sup>36</sup> F. MORRISEY and S. HOLLAND, “Ministerial Juridic Persons and Their Communion with Diocesan Bishops,” in *Health Progress*, vol. 97, no. 6, November-December 2016, 71.

<sup>37</sup> BENEDICT XVI, *Deus caritas est*, no. 31.

An encounter with God in Christ requires an awareness on the part of the subject and a willingness to answer this call to holiness. On the part of lay men and women, the Second Vatican Council made it clear that this was to be done primarily in the secular realm (see *LG*, 31). Answering the call that is rooted in the Sacraments of Initiation, they are to be witnesses of Christ in the world, in their secular professions and occupations, in their family and social life.<sup>38</sup> This call to mission is made to all the baptized, but some are called by the hierarchy to take part in its life and activity, in parishes, in schools, in diocesan offices, in Church institutions. In their 2005 document *Co-Workers in the Vineyard of the Lord*, the United States Conference of Catholic Bishops (USCCB) offered a list of characteristics for this ecclesial service:

*Authorization* of the hierarchy to serve publicly in the [...] Church,  
*Leadership* in a particular area of ministry,  
*Close mutual collaboration* with the pastoral ministry of bishops, priests and deacons,  
*Preparation and formation* appropriate to the level of responsibilities that are assigned to them.<sup>39</sup>

As they had done in another document five years earlier, the bishops chose to retain the titles “lay ecclesial ministers” for such men and women and “lay ecclesial ministry” for their service.<sup>40</sup> *Co-Workers* takes a deeper dive into these titles, explaining how they reflect certain realities.

The ministry is *lay* because it is a service done by lay persons. The sacramental basis is the Sacraments of Initiation, not the Sacrament of Ordination. The ministry is *ecclesial* because it has a place within the community of the Church, whose communion and mission it serves, and because it is submitted to the discernment, authorization and supervision of the hierarchy. Finally, it is *ministry* because it is a participation in the threefold ministry of Christ, who is priest, prophet, and king. “In this original sense the term *ministry* (*servitium*) expressed only the work by which the Church’s members continue the mission and ministry of Christ within her and the whole world.” We apply the term “ministry” to certain works undertaken by the

<sup>38</sup> See JOHN PAUL II, post-synodal apostolic exhortation on the vocation and the mission of the lay faithful in the Church and in the world *Christifideles laici*, 30 December 1988, no. 15, in AAS, 81 (1989), 414, English translation at [http://www.vatican.va/content/john-paul-ii/en/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_30121988\\_christifideles-laici.html](http://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici.html) (12 April 2021).

<sup>39</sup> UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Co-Workers in the Vineyard of the Lord: A Resource for Guiding the Development of Lay Ecclesial Ministry*, Washington, DC, USCCB, 2005 (= USCCB, *Co-Workers in the Vineyard of the Lord*), 10.

<sup>40</sup> See *ibid.*; see also USCCB SUBCOMMITTEE ON LAY MINISTRY, *Lay Ecclesial Ministry: The State of the Questions*, Washington, DC, USCCB, 1999, 7-8.

lay faithful by making constant reference to one source, the ministry of Christ.<sup>41</sup>

Catholic health ministry is rooted in the *healing ministry of Jesus Christ* and, for those who are called to this ministry, it means providing excellence in healing our neighbour. But, in Jesus' footsteps, it is bringing comfort and compassion—in other words, “a reason to hope.”<sup>42</sup> It is responding to a call, a vocation. “The Catholic tradition sees this concrete involvement as a sacramental presence, an encounter with Christ. It is that vision which defines the quality of their relationship with those in need of care.”<sup>43</sup>

With this in mind, the call to a vocation in Catholic healthcare sponsorship must not be seen as merely the result of a diminished number of religious. While it was called into action by these events, one may say it was there all along, perhaps latently, but still a call simply waiting to be answered. It is a vocation, and sponsorship is a vocation for which the gifts of the Spirit are offered to take on the tasks and office. If answered, the call gives rise to a passion, a mission, and a profession, called to something they love, to something they are good at, and to something the world needs.<sup>44</sup> Sponsorship is a call to Catholics, but it is a call to all Christians who hear it and have a passion for perpetuating the healing ministry of Jesus. It is a call to the ministry of healing, a sign of Jesus Christ's healing mission. It is rooted in Christian baptism, an invitation by the Church to exercise an ecclesial ministry within a community in a Catholic organization, and it is submitted to the discernment and authorization of the Church. It serves publicly as it receives the authorization of the Church hierarchy, the bishop or the Holy See; it directs and influences its sponsored organizations in exercising their ministry faithfully and integrally; and it must be exercised in close collaboration with the hierarchy. It goes without saying that sponsoring board members must be adequately prepared for their ministry and ensured that their formation will serve the sponsorship mission.

Canon 231 § 1 specifies that “lay persons who permanently or temporarily devote themselves to special service to the Church are obliged to acquire

<sup>41</sup> USCCB, *Co-Workers in the Vineyard of the Lord*, 11-12, citing the instruction from the CONGREGATION FOR THE CLERGY ET AL., *Instruction on Certain Questions regarding the Collaboration of the Non-Ordained Faithful in the Sacred Ministry of Priests* “*Ecclesiae de mysterio*,” Practical Provisions, art. 2, Libreria Editrice Vaticana, 1997.

<sup>42</sup> CATHOLIC HEALTH ALLIANCE OF CANADA (CHAC), *Health Ethics Guide*, 3<sup>rd</sup> edition, Ottawa, Novalis, 2012 (= CHAC, *Health Ethics Guide*), 10, citing J. BERNARDIN, “What Makes a Hospital Catholic—A Response,” in *America*, 174 (15), 4 May 1996, 9.

<sup>43</sup> CHAC, *Health Ethics Guide*, 9.

<sup>44</sup> See BOUCHARD, “Theology, Ministry, and Sponsorship.”

the appropriate formation required to fulfill their function properly and to carry out this function conscientiously, eagerly, and diligently.” It is clear that the Supreme Legislator makes formation an obligation. *Co-Workers in the Vineyard of the Lord* bases its formation model on the traditional four-area framework provided for the formation of priests and deacons:

*human qualities* critical to form wholesome relationships and necessary to be apt instruments of God’s love and compassion,  
*a spirituality* and practice of prayer that root them in God’s Trinitarian life, grounding and animating all they do in ministry,  
*adequate knowledge* in theological and pastoral studies, along with the *intellectual skill* to use it among the people and cultures of our country,  
 the practical *pastoral abilities* called for in their particular ministry.<sup>45</sup>

As lay persons initially became involved in sponsorship, the presence of the religious served as a formation model. The religious generously transferred their knowledge, and their commitment to ministry was contagious. As their presence on sponsorship boards diminishes, it is inconceivable to ask lay people to assume leadership without ensuring they have received formation that will allow them to appreciate the call they have received and the ecclesial ministry they are undertaking. Today, the vast majority of sponsors have put in place robust formation programs for their members. Although they may vary in content and delivery models, many focus on these themes:

- *The call to serve*, its foundation in the Scriptures, the call to holiness and discipleship, the participation in the healing ministry of Jesus, discernment, and the call to serve in sponsorship as a public ministry of the Church.
- *The call to serve within the Church*, the Church in response to the Second Vatican Council, the dignity of the human person, the Church in the modern world, the relationship with the Church hierarchy, and canon law as applied to sponsorship.
- *The call to be a prophetic voice*, Catholic social teaching, the discernment of community health needs and the corresponding decision-making as a sponsor, Catholic health ethics and governance.
- *The call to be a sign of hope*, Catholic health ministry and its holistic approach to health care, the role of the laity in the transformation of society.<sup>46</sup>

<sup>45</sup> USCCB, *Co-Workers in the Vineyard of the Lord*, 34.

<sup>46</sup> See C. O’CONNOR and T.H. MORRIS, “Sponsor Formation Conveys a Living Legacy,” in *Health Progress*, May-June 2017, 48-49.

A comprehensive formation program composed of theological, ethical, canonical, and spiritual resources will ensure that those who serve on sponsorship boards and in the leadership of healthcare organizations will understand that their responsibility is to support the Catholic identity of their ministries and to be good stewards for them, that they act in the name of the Church, and that they are the liaison between their sponsored organizations and the Church. In other words, they take on the responsibility of ensuring their sponsored organizations remain Catholic, with the recognition of the Church and operating in accordance with the discipline and laws of the Church. As with any organization, there must a rendering of accounts to the entities with which there is a relationship. The duty of accountability for sponsors is no exception.

### 3 — *Sponsorship and Its Accountability Duty*

*Accountability* is a term that can either inspire confidence in an organization or set off warning signs of dysfunction and potential failure. It is often used in a broad sense, meaning responsibility, effectiveness, transparency, integrity. In a narrow sense, it is “the obligation to explain and justify conduct.” The former refers to “standards for proactive responsible behaviour of actors”; the latter refers to “concrete practices of account giving, the relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct [...]”.<sup>47</sup> It is a component of “quality control,” and sponsorship is no different (see cc. 671 § 1; 806 § 2). If there is a lack of accountability or none at all, there may be a risk of mismanagement or fraud, or at least the perception of impending problems. The reputation of an institution is of utmost importance, since the sponsor’s name refers to works undertaken in the name of the Church (c. 166 § 1).<sup>48</sup>

A sponsoring board or MJP, acting in the name of the Church, has a duty of accountability, both in the *formal* sense and in the *informal* sense. Formally, they are accountable to the competent Church authority—the Holy See for pontifical MJPs and to the diocesan bishop for diocesan MJPs, and their accountability will be defined in their canonical statutes and civil bylaws. Informally, they are accountable to the bishops where their sponsored works are located.

<sup>47</sup> M. BOVENS, “Analysing and Assessing Public Accountability. A Conceptual Framework,” in *European Governance Papers*, Utrecht University, 2006, 3, 8.

<sup>48</sup> See CHA, *A Guide to Understanding Public Juridic Persons*, 10.

As boards are now mainly composed of lay members, ecclesial authorities must rest assured that the mission is being carried out as intended. More than ever, a sponsor's duty of accountability is imperative as Catholic health care faces increased expenditures due to the aging population, inflation, systemic challenges with outdated infrastructures, staff shortages, not to mention the significant impact of the Covid-19 pandemic.<sup>49</sup> There are also compelling reasons for Catholic healthcare systems to enhance the quality and cost effectiveness of healthcare services through mergers, amalgamations, strategic alliances and networks, joint ventures, and partnerships, in some cases with non-Catholic organizations. There are societal and legal pressures that violate Catholic fundamental values and ethical guidelines. The response to these challenges rests with the sponsors, the governance boards, and other leaders, but bishops also have a responsibility to ensure that all apostolates in their dioceses are administered in accordance with Church teachings and laws. It is in the spirit of collaboration that sponsors must understand that the challenges they face in their ministry are not solely their own: they are also accountable to Church authorities, either *formally* or *informally*, and those involved in their sponsored works must understand this obligation.

### 3.1 — Accountability to the Holy See

A pontifical MJP has a formal line of accountability with the Holy See, namely the CICLSAL. This relationship is maintained in various ways, by:

- the approval of its statutes,
- the observation of requirements for the valid alienation of property,
- the annual report to the Holy See (focused on accountability as described in the statutes), and
- regular meetings of the sponsor and the CICLSAL (usually every three years).

Additionally, CICLSAL has requested that at least one member of the sponsor be a professed member of a religious institute.<sup>50</sup> These are concrete practices of account rendering, ensuring that the relationship between the

<sup>49</sup> See THE CONFERENCE BOARD OF CANADA, *Health Care Cost Drivers in Canada: Pre and Post Covid-19*, September 2020; see also UNITED STATES GOVERNMENT, CENTERS FOR MEDICARE AND MEDICAID SERVICES (USA), *National Health Expenditure Projections 2018-2027*, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/ForecastSummary.pdf> (14 April 2021).

<sup>50</sup> As reported by D. O'BRIEN and W. WACK in the CHA webinar, "Sponsorship: Sustaining the Ministry, Session Six – Sponsors and the Church, Local and Universal," 10 February 2021 (restricted access) (= O'BRIEN and WACK, "Sponsors and the Church, Local and Universal").

sponsor and the Church is maintained. The annual report will include information on how the sponsor maintains mission integrity and financial viability, preserves Catholic identity, answers the needs of the poor and marginalized, and ensures ongoing formation of its leadership.

### 3.2 — Accountability to the Local Ordinary

The relationship between an MJP and the local ordinary will be different, depending on whether the MJP is of pontifical or diocesan right. The former is an “indirect” relationship, and the latter is a “direct” relationship. For MJPs of diocesan right, the relationship with the bishop will be more structured, regulated by particular law or practices, and the accountability tools that are required for MJPs of pontifical right could be a model, with necessary adjustments.

As for the informal accountability that a pontifical MJP has with local bishops, it is a relationship that is based on recognition that the bishop, in his diocese, is the primary teacher of the local faith community and has the authority to determine if a sponsored work is Catholic (cc. 381 § 1; 392 § 1; 394 § 1). Therefore, bishops must be provided with a clear line of sight on sponsors and sponsored works, and sponsors should share with bishops how they are ensuring that their organizations are continuing the healing ministry of Jesus and preserving their Catholic identity. Issues concerning ethical questions, proposed partnerships with other organizations, Catholic or non-Catholic, and formation of lay leaders should all be included. In many organizations, the CEO meets regularly with the diocesan bishop. This should be fostered by ensuring “that there be a mutual understanding between sponsors, governance, and mission about how Catholic identity and integrity are being demonstrated with the organization and how that message is being communicated.”<sup>51</sup> Regardless of its status, the following principles should be taken into account by the MJP leadership:

- know the particular law of the diocese(s) as there may be requirements for MJPs that need to be fulfilled;
- build a relationship of trust with the bishop;
- foster an open and true partnership;
- have an open and honest relationship (e.g., share the report to the Holy See with him);
- don’t wait for a crisis to keep him informed;

<sup>51</sup> B. SMITH, “Demystifying Who and What Sponsorship Is,” in *Health Progress*, May-June 2017 (= SMITH, “Demystifying Who and What Sponsorship Is”), 10.



- invite him to celebrations, installations, etc.;
- be involved with the local Church (collaborate with other Catholic works or works of Catholics);
- ask him how the sponsor can be of service to him.<sup>52</sup>

In the interest of encouraging accountability through mutual cooperation and communication, the USCCB updated a 1997 document on the relationship between diocesan bishops and healthcare ministries. *The Pastoral Role of the Diocesan Bishop in Catholic Health Care Ministry*<sup>53</sup> encourages consistency among dioceses in the application of religious and ethical directives (ERDs). Father Charles Bouchard, OP, explains: “Because the USCCB has no juridic authority over individual bishops, the bishops issue the ERDs as directives and not legislation. The new document suggests that a bishop can strengthen the legal authority of the directives by promulgating them as “particular law” in his diocese. Making them law does not affect the bishop’s right to interpret them, but it does help assure a consistent standard from one diocese to another.”<sup>54</sup>

As health care is their mutual responsibility, the guide calls for an ongoing dialogue and collaboration between bishops and Catholic healthcare leadership, more like a partnership.

As some MJPs have ministries in several dioceses, there will be a renewed call on bishops to work together. Since they are encouraged to foster “collaboration among all the various actors involved in the Catholic healthcare ministry,”<sup>55</sup> bishops should also seek to work collaboratively to “speak with one voice” when exercising their authority over an MJP. The guide devotes an entire section to interdiocesan cooperation and collaboration and refers to the US ethical directives in stressing that “the bishop should consider not only the circumstances in his local diocese but also the regional and national implications of his decision.”<sup>56</sup>

<sup>52</sup> As suggested by O’BRIEN and WACK, “Sponsors and the Church, Local and Universal.”

<sup>53</sup> USCCB, *The Pastoral Role of the Diocesan Bishop in Catholic Health Care Ministry*, 2nd edition, Washington, DC, USCCB, 2020 (= USCCB, *The Pastoral Role of the Diocesan Bishop in Catholic Health Care Ministry*).

<sup>54</sup> CHA, “Updated Guide Illuminates Relationship between Bishops and Health Care Ministries,” in *Catholic Health World*, 15 February 2021, 2.

<sup>55</sup> USCCB, *The Pastoral Role of the Diocesan Bishop in Catholic Health Care Ministry*, art. 14, 4.

<sup>56</sup> Ibid., art. 29, 6, citing USCCB, *Ethical and Religious Directives for Catholic Health Care Services*, 6th edition, Washington, DC, 2018, art. 67, 25.

### 3.3 — Accountability and Sponsored Organizations

Those governing sponsored works must be cognisant of their sponsor's obligation for accountability to Church authorities and recognize the bishop's lawful role and authority.<sup>57</sup> As bishops and their staff must inform themselves about the complexities of health care, "at the same time, sponsors, administrators, and board members need to develop a fundamental grasp of the doctrinal, pastoral, and canonical principles that have a bearing on Catholic health care delivery."<sup>58</sup> In this, sponsors have a duty towards their sponsored organizations to clarify the practical accountabilities within the Church and move towards a mutual understanding of Catholic identity and mission integration.

As was explained previously, sponsorship has various models of interaction between the sponsoring board and the fiduciary board. Whether the sponsor is a religious congregation or a board of religious and lay, or whether an organization is sponsored by a unique entity or co-sponsored by two entities—a sponsoring board and a fiduciary board—there is a commonality of accountability expectations. The sponsor expects its organizations to have a clear understanding of the mission and the vision, to carry out their mission within approved parameters, and to live out their Catholic identity. That is their obligation towards the sponsor and towards the Church, but it is also their right to ask that the sponsor assist them in achieving these goals.

The criteria by which a sponsor may assess the performance of its sponsored organizations is based on the seven principles that are necessary to qualify as a "Catholic work." It must have a spiritual purpose (c. 114), answer a need (c. 114), have sufficient means to achieve its purpose (cc. 114 § 3; 610), have a certain perpetuity or stability, act as a good steward (c. 1284 § 1), make it a work of quality (cc. 19; 806), and ensure proper formation (c. 231 § 1). These are the guidelines by which a sponsor may evaluate its fidelity to carrying out its mission in the name of the Church.<sup>59</sup> Catholic health ethics guides also serve as valuable assessment tool.

In 2016, the Catholic Health Alliance of Canada (CHAC), with the assistance of bishops in dioceses where there are Catholic healthcare organizations, began work on an assessment tool for sponsors that would help measure their success and reinforce and enhance their accountability. The tool included an outcomes table that would assist in measuring performance and

<sup>57</sup> See *ibid.*, art. 8, 3.

<sup>58</sup> *Ibid.*, art. 25, 5.

<sup>59</sup> See CHA, *Guide for Sponsors in Catholic Health Care*, 8; see also MORRISEY, "Our Sponsors: Yesterday, Today, and Tomorrow," 63-65.

could be used as a self-assessment and as an external assessment. The outcomes table is aligned with the Governance and Administration articles of the *CHAC Health Ethics Guide*. It is comprised of three responsibility areas and their corresponding desired outcomes.

1. Guide and support sponsored works in their missions within the Church.
  - a. Work closely and foster strong relationships with local Church leaders who shepherd the mission.
  - b. Develop, share, and/or provide access to tools for sponsored works within the mission, as well as potential others.
  - c. Monitor and shape individual sponsored works as they live out the mission.
  - d. Lead formation for sponsored work board members, senior leaders, staff, physicians, and volunteers.
2. Establish and sustain sponsor identity across generations.
  - a. Undertake ongoing sponsor formation.
  - b. Ensure that sponsor identity, including heritage, is a core element of organizational development.
  - c. Promote understanding of sponsor identity and heritage, especially within the sponsor organization, and on the boards of sponsored works.
  - d. Ensure the sustainability of the mission.
3. Challenge and encourage the ministry to grow and change over time to meet unmet needs and achieve high quality with compassion and respect.
  - a. Continuously assess and understand unmet needs, particularly with respect to care of the poor and those most vulnerable.
  - b. Ensure that care of the poor and those most vulnerable is an essential focus of the health ministry and that the community's health needs are effectively addressed.
  - c. Advocate for and lead transformation and change to meet the needs of those most vulnerable.
  - d. Ensure that the ongoing growth and transformation of the health ministry takes place as an embedded, integrated part of the overall work of the Church in the local diocese.
  - e. Ensure Catholic health is known for its high quality and has the trust and confidence of those in need.<sup>60</sup>

<sup>60</sup> See CHAC, *Roles, Relationships and Accountability. Resources for Catholic Health Sponsors*, August 2019, Appendix A, 18-23.

Annual assessments by sponsored organizations can pertain to the clarity of the sponsor's expectations, the relationship between the organization and its sponsor, and the support provided to the organization by way of personal contact, visits, guidelines, tools, etc. There should be a clear distinction between the roles of the sponsoring board, the sponsor's staff, and the leadership of sponsored organizations:

Sponsors are responsible for keeping the mission and ministry of Catholic health care vibrant. Senior leaders are responsible for operationalizing it. Sponsors create the vision and inspire others to share in the mission of Catholic health care, steward the ministry and maintain accountability to Rome and the diocesan bishop. Senior leaders, including the mission leader, are responsible for creating the policies, procedures, practices and culture to make sure the vision is being realized. For vision and practice to come together, sponsors, senior leaders and mission leaders must establish working relationships.<sup>61</sup>

Sponsors have a duty to be there for their sponsored works when needed and to be visible. They have a duty to make the mission come alive, not only for the leadership but also for the staff. Personal visits by sponsoring boards to see how their organizations operate are priceless. After all, sponsorship is first a *relationship* with the Church and with the sponsored organizations.

## *Conclusion*

When he received the Lifetime Achievement Award from the Catholic Health Association of the United States in 2019, Father Morrissey was asked to write a letter to his younger self, revealing what the future will hold for him. In it, he describes how he came to love Catholic health care.

[...] your ministry as a canonist will also lead you to a new life, new directions as you try to delve into new canonical structures to respond to parishes having to be closed and religious institutes realizing their ministry is nearing completion. This work will usher in a new acceptance of the role of the laity. You'll believe lay persons could and should assume a significant and rightful place in the Church's ministry, especially in areas of governance related to health care, education, and social services. You'll work tirelessly to help ministries develop structures that will enable them to flourish into the future, serving those on the margins, protecting the dignity of each human person.<sup>62</sup>

<sup>61</sup> SMITH, "Demystifying Who and What Sponsorship Is," 11.

<sup>62</sup> Excerpt of *2019 Lifetime Achievement Award—Fr. Francis G. Morrissey* CHA video, 10 June 2019, <https://www.chausa.org/assembly-2019/awards/lifetime-achievement-award> (16 April 2021).

It is easy to see that his work has borne fruit that he probably never envisaged. As Catholic healthcare sponsors have evolved from when the religious owned and sponsored their institutions to today's MJP model of sponsorship, the significance this has had for lay ministry has gradually come to light. It is one of the most astounding developments of lay participation in the mission of the Church. As sponsoring boards have steadily been turned over to the laity, the realization has come that it is not simply an invitation to sit on a board; it is a call to ministry. The preservation of the Catholic identity of sponsored organizations is in their hands, as is the assurance of fidelity to the healing ministry of Jesus Christ.

With this responsibility comes the duty of rendering accounts, to the Church authorities who established the MJPs, to the bishops who must exercise vigilance over works of apostolate in their diocese, and to those who operate the sponsored works. It is a responsibility that must be understood not merely as a corporate task to be realized, but as an act of ecclesial communion. Formation is key to success, as Father Morrissey knew well:

A [...] point that must be kept in mind for the future is the on-going formation of those to whom we have entrusted the delivery of Catholic health care. It is not fair to expect them to have all the required knowledge, and, if we don't provide it to them in an understandable way, we should not be surprised that, through no fault of their own, they make decisions which could have long-term negative effects on the delivery of Catholic health care in Canada.<sup>63</sup>

Recruiting lay people capable of perpetuating the ministry of sponsorship is not an easy task. The complexity of healthcare systems today calls for sponsoring boards endowed with a strong and varied skill-set, but it must be more than that:

Sponsorship today is more than just a juridical or organizational construct. It is an unprecedented new opportunity for all sponsor members to deepen their own spiritual lives and for Catholics to realize their baptismal call in a vocation of leadership. They answer this call in order to continue the healing ministry of the Church in the spirit of the founders. It is also a moment when the Church recognizes new gifts of the Spirit for a new time and is calling on lay persons to accept these gifts in service to the Church's healing ministry and to the common good of all people.<sup>64</sup>

Lay people who are called to serve on sponsorship boards are being called to a vocation, to a ministry. It is firmly engaged in that sense and with an ongoing deepening of their sponsorship knowledge and spirituality

<sup>63</sup> F. MORRISSEY, "Delivery and Sponsorship of Catholic Health Care in Canada: Yesterday, Today, and Tomorrow," paper given at the annual CHAC conference, Ottawa, 2 May 2014.

<sup>64</sup> CHA, *Guide for Sponsors in Catholic Health Care*, 4.

that the laity will strengthen their relationship to the Church hierarchy, founded on trust and magnanimity, much in the same way the sisters saw their own circumstances as the perfect occasion to call the laity to ensure the legacy of their mission. Lay sponsors have big shoes to fill but it need not be daunting.

## PRESCRIPTION OF CRIMINAL ACTION IN THE *IUS VIGENS*: PRAXIS

BRIAN T. AUSTIN

**SUMMARY** — An earlier study addressed a number of theoretical and disputed questions regarding the canonical institute of prescription of criminal action. This study identifies the changes introduced to this institute by the revised Book VI of the Latin code. It then addresses a number of important practical questions, with particular attention to the praxis of the Congregation for the Doctrine of the Faith. The study concludes with a consideration of some alternatives to the penal process.

**RÉSUMÉ** — Une étude antérieure a abordé un certain nombre de questions théoriques et controversées concernant l'institution canonique de la prescription de l'action criminelle. La présente étude identifie les changements introduits dans cette institution par le livre VI révisé du code latin. Elle aborde ensuite un certain nombre de questions pratiques importantes, avec une attention particulière à la pratique de la Congrégation pour la doctrine de la foi. L'étude se termine par l'examen de quelques possibilités autres que la procédure pénale.

### *Introduction*

An earlier study addressed a number of theoretical and disputed questions regarding the canonical institute of prescription of criminal action.<sup>1</sup> The numerous, successive changes to this institute in a relatively short span of time, together with a number of unpublished norms, make it exceedingly complex to apply in practice.<sup>2</sup> This study, therefore, first addresses the changes introduced to this institute by the revised Book VI of the Latin code. It then determines the precise periods of prescription to be applied in the adjudication of

<sup>1</sup> Brian Thomas AUSTIN, "Prescription of Criminal Action in the *Ius Vigens*: Theory and Disputed Questions," in *StC*, 54 (2020), 343–385 (= AUSTIN, "Prescription: Theory").

<sup>2</sup> See Eduardo BAURA, "El desarrollo normativo posterior a la Constitución Apostólica *Pastor Bonus* de los tribunales de la Curia Romana," in *IC*, 58 (2018), 10–16.

delicts, taking into account the universal (or common) law of the two codes, the special norms for the Congregation for the Doctrine of the Faith (CDF), and the particular law for the United States Conference of Catholic Bishops (USCCB). The study concludes with a consideration of some alternative legal remedies when the penal process is no longer available due to the extinction of action.

## 1 — *The Revised Canon 1362*

On 23 May 2021, Pope Francis signed the long-awaited apostolic constitution *Pascite gregem Dei*, bringing to a close the fourteen-year period of revision of Book VI of the Latin code.<sup>3</sup> Although the revised text introduces a number of important changes to the substantive penal law of the Latin Church, this study will limit itself to a description of the changes to the institute of prescription. None of the changes is retroactive (c. 9), unless it should be more favourable to the accused (c. 1313 § 1). The following table presents a simplified *iter* of the revised canon 1362.<sup>4</sup>

<i>CIC/1983, c. 1362</i>	<i>July 2011 Schema<sup>5</sup>, c. 1362</i>	<i>CIC/2021, c. 1362</i>
§ 1. Actio criminalis praescriptione extinguitur triennio, nisi agatur:	§ 1. Actio criminalis praescriptione extinguitur triennio, nisi agatur:	§ 1. Actio criminalis praescriptione extinguitur triennio, nisi agatur:
1° de delictis Congregationi pro Doctrina Fidei reservatis;	1° de delictis Congregationi pro Doctrina Fidei reservatis;	1° de delictis Congregationi pro Doctrina Fidei reservatis, <b>quae normis specialibus subiciuntur</b> ;

<sup>3</sup> FRANCIS, constitutio apostolica qua Liber VI Codicis iuris canonici reformatur *Pascite gregem Dei*, 23 May 2021, [https://www.vatican.va/content/francesco/la/apost\\_constitutions/documents/papa-francesco\\_costituzione-ap\\_20210523\\_pascite-gregem-dei.html](https://www.vatican.va/content/francesco/la/apost_constitutions/documents/papa-francesco_costituzione-ap_20210523_pascite-gregem-dei.html). The constitution was promulgated by its publication in *OR* on 1 June 2021; the revised Book VI enters into force on 8 December 2021 (cf. c. 8 § 1). For some details regarding its drafting, see Juan Ignacio ARRIETA, “El proyecto de revisión del Libro VI del Código de derecho canónico,” in *Anuario de derecho canónico*, 2 (2013), 223; Joaquín LLOBELL, “Giusto processo e ‘amministrativizzazione’ della procedura penale canonica,” in *Stato, Chiese e pluralismo confessionale*, no. 14, 15 April 2019, 12, <http://dx.doi.org/10.13130/1971-8543/11550>. More generally, see Brian Thomas Austin, “The Revised Book II, Part I: Selected Norms and Commentary,” in *The Jurist*, 77 (2021), 269-312.

<sup>4</sup> For the complete table, see <https://www.iuscanreg.it/tavolecomparative.php>.

<sup>5</sup> PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Schema recognitionis Libri VI Codicis Iuris Canonici (Reservatum)*, Vatican City, Typis polyglottis Vaticanis, 2011. Also available at <https://www.iuscanreg.it/pdf/SchemaRecognitionisLibriVI.pdf>.



<i>CIC/1983, c. 1362</i>	<i>July 2011 Schema<sup>5</sup>, c. 1362</i>	<i>CIC/2021, c. 1362</i>
2° de actione ob delicta de quibus in cann. 1394, 1395, 1397, 1398, quae quinquennio praescribitur;	2° <b>firmiter praescripto n. 1</b> , de actione ob delicta de quibus in cann. 1394, 1395, 1397, 1398, quae <i>quinquennio</i> praescribitur;	2° firmiter praescripto n. 1, de actione ob delicta de quibus in cann. <b>1376, 1377, 1378, 1393, § 1</b> , 1394, 1395, 1397, 1398, <b>§ 2</b> , quae <b>septennio</b> praescribitur, <b>vel de ea ob delicta de quibus in can. 1398, § 1, quae viginti annorum spatio praescribitur;</b>
3° de delictis quae non sunt iure communi punita, si lex particularis alium praescriptionis terminum statuerit.	3° de delictis quae non sunt iure communi punita, si lex particularis alium praescriptionis terminum statuerit.	3° de delictis quae non sunt iure communi punita, si lex particularis alium praescriptionis terminum statuerit.
§ 2. Praescriptio decurrit ex die quo delictum patratum est, vel, si delictum sit permanens vel habituale, ex die quo cessavit.	§ 2. Praescriptio decurrit ex die quo delictum patratum est, vel, si delictum sit permanens vel habituale, ex die quo cessavit.	§ 2. Praescriptio, <b>nisi aliud in lege statuatur</b> , decurrit ex die quo delictum patratum est, vel, si delictum sit permanens vel habituale, ex die quo cessavit.
		§ 3. Reo ad normam can. 1723 citato vel modo praeviso in can. 1507, § 3, certiore facto de exhibitione accusationis libelli iuxta can. 1721, § 1, praescriptio actionis criminalis suspenditur per tres annos, quo termino elapso vel interrupta suspensione, cessationis processus poenalis causa, rursus currit tempus, quod adiungitur ad illud iam decursum pro praescriptione. Eadem suspensio pariter viget si, servato can. 1720, n. 1, ad poenam irrogandam vel declarandam per decretum extra iudicium procedatur.

The first number of the first paragraph of the revised canon now explicitly states that delicts reserved to the CDF “are governed by special norms.”<sup>6</sup> These special norms will be treated in a separate section below. Secondly,

<sup>6</sup> *CIC/2021, c. 1362 § 1, 1°*: “normis specialibus subiciuntur.”

the canons of Part II of Book VI have been rearranged and thus renumbered. Care must be taken, therefore, when resolving cross-references or consulting commentaries on the previous legislation. The following table lists the canons referring to delicts giving rise to actions which were formerly prescribed by three or five years but are now prescribed by *seven* years (c. 1368 § 1, 2°), without prejudice to the special norms governing delicts reserved to the CDF.

<i>CIC/1983</i>	<i>Schema/2011</i>	<i>CIC/2021</i>
1377	1378	1376
1386	1377	1377
1389	1376	1378
1392	1393 § 2	1393 § 1
1394	1394	1394
1395	1395	1395
1397	1397	1397 § 1
1398	1398	1397 § 2

The revised canon 1398 incorporates certain provisions of *Vos estis lux mundi*<sup>7</sup> (*VELM*) and *Sacramentorum sanctitatis tutela*<sup>8</sup> (*SST*), but it also modifies and extends them in significant ways. For the purposes of this study, it is sufficient to note that actions arising from the delicts defined in canon 1398 § 1 are prescribed after twenty years; those in 1398 § 2, after seven years. As in the previous legislation, actions for other delicts are prescribed after three years (c. 1362 § 1) unless otherwise established (c. 1362 § 1, 3°).

The second paragraph of the revised canon makes provision for a penal law to establish a *terminus a quo* for the running of prescription distinct from the day on which the delict was committed. This provision, already in effect with respect to delicts *contra sextum cum minore* reserved to the CDF,<sup>9</sup> is now extended to lower legislators.

<sup>7</sup> FRANCIS, apostolic letter *motu proprio* instituting new procedures for the preliminary investigation of allegations of the sexual abuse of minors or other vulnerable persons involving prelates *Vos estis lux mundi*, 7 May 2019, art. 1 § 1a, [http://w2.vatican.va/content/francesco/it/motu\\_proprio/documents/papa-francesco-motu-proprio-20190507\\_vos-estis-lux-mundi.html](http://w2.vatican.va/content/francesco/it/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html), in *Comm*, 51 (2019), 23–33 [hereafter *VELM*].

<sup>8</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, rescript *ex Audientia* modifying *SST/2010*, 3 December 2019, art. 6 § 1, [https://www.vatican.va/roman\\_curia/secretariat\\_state/2019/documents/rc-seg-st-20191203\\_rescriptum\\_it.html](https://www.vatican.va/roman_curia/secretariat_state/2019/documents/rc-seg-st-20191203_rescriptum_it.html), in *Comm*, 51 (2019), 364–365 [hereafter *SST/2019*].

<sup>9</sup> *SST/2001*, art. 5 § 2; cf. *SST/2010*, art. 7 § 2.

The third paragraph of the revised canon is new. It fills a gap in the law which had existed even under the *Corpus iuris canonici*, namely, concerning the specific procedural act that suspends or interrupts the running of prescription.<sup>10</sup>

When the accused has been cited according to the norm of canon 1723 or informed in the manner provided in canon 1507 §3 of the presentation of the libellus of accusation according to canon 1721 §1, prescription of the criminal action is suspended for three years; once this period has expired or the suspension has been interrupted by the cessation of the penal process, time runs again and is added to the period of prescription which has already elapsed. The same suspension equally applies if, canon 1720, 1° having been observed, the procedure is followed for imposing or declaring a penalty by means of an extrajudicial decree.<sup>11</sup>

The revised canon also clarifies that prescription (and suspension thereof) equally applies to the judicial and extrajudicial (administrative) penal process.

## 2 — Reservation and the Competent Forum

Whenever a denunciation is received by an ordinary or hierarch concerning a delict “which has at least the appearance of truth,”<sup>12</sup> the first juridic fact to be determined is the competent forum (cf. *CIC*/1983, cc. 1404–1416; *CCEO*/1990, cc. 1058–1085). It must also be determined whether or not the

<sup>10</sup> On the existence of this *lacuna legis*, see Joaquín LLOBELL, “Sull’interruzione e sulla sospensione della prescrizione dell’azione penale,” in *IE*, 25 (2013), 643–645; AUSTIN, “Prescription: Theory,” 357–364.

<sup>11</sup> *CIC*/2021, c. 1362 §3. “Reo ad normam can. 1723 citato vel modo praeviso in can. 1507, §3, certiore facto de exhibitione accusationis libelli iuxta can. 1721, §1, praescriptio actionis criminalis suspenditur per tres annos, quo termino elapso vel interrupta suspensione, cessationis processus poenalis causa, rursus currit tempus, quod adiungitur ad illud iam decursum pro praescriptione. Eadem suspensio pariter viget si, servato can. 1720, n. 1, ad poenam irrogandam vel declarandam per decretum extra iudicium procedatur.”

<sup>12</sup> *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria editrice Vaticana, 1983) [hereafter *CIC*/1983], c. 1717 §1. “Quoties ... notitiam saltem veri similem habet de delicto;” cf. JOHN PAUL II, apostolic letter *motu proprio* promulgating norms concerning the graver delicts reserved to the CDF *Sacramentorum sanctitatis tutela*, 30 April 2001, art. 13, in *AAS* 93 (2001), 737–739 [hereafter *SST*/2001], Latin original with English translation in W.H. WOESTMAN (ed.), *Ecclesiastical Sanctions and the Penal Process*, Ottawa, St. Paul University, 2003, 300–309. “Quoties ... notitiam saltem verisimilem habeat de delicto reservato. CONGREGATION FOR THE DOCTRINE OF THE FAITH, rescript *ex Audientia* modifying *SST*/2001, 21 May 2010, art. 16, in *AAS* 102 (2010), 419–430 [hereafter *SST*/2010]. “Quoties ... notitiam saltem verisimilem habeat de delicto graviore.” Note the inconsistent orthography, diction, and syntax.

delict is reserved to the CDF, since the law of prescription operates differently for reserved and non-reserved delicts (c. 1362 § 1, 1<sup>o</sup>; *CCEO*/1990, c. 1152 § 2). The delict may be reserved either on account of the subject matter (*ratione materiae*)<sup>13</sup> or on account of the juridic status of the person who has been denounced (*ratione personae*), or on account of both (*ratione materiae et personae*). This section must determine, therefore, which delicts were reserved to the CDF, and when.

## 2.1 — Reservation of Delicts

The institute of the reservation of delicts to the CDF has a long and rather storied history,<sup>14</sup> but its essential juridic nature in the *ius vigens* is summarized by Baura.

It has been noted that the reservation of delicts to the CDF is connected to the institute of [*advocatio causae* of canon 1417 § 2], so that, precisely because it is a question of *advocatio*, it is presupposed that the competence of another tribunal remains. In other words, reservation should not be confused with exclusive jurisdiction: in first instance, the jurisdiction of the local tribunal would remain, so that if the CDF decided to order the lower tribunal to proceed, such a decision would not strictly speaking consist of an extension of jurisdiction... In practice, this usually results in the intervention of the lower authorities (in the handling of the *notitia criminis* and, in most cases, of the instruction). If a lower tribunal were to judge without an order from the CDF to proceed, it would act as a court with relative incompetence, with the consequences established in canon 1460 § 2. On the other hand, the competence of the CDF is exclusive with regard to other tribunals of the Roman Curia, and in second instance it is exclusive in absolute terms.<sup>15</sup>

<sup>13</sup> Cf. JOHN PAUL II, apostolic constitution on the Roman Curia *Pastor bonus*, 28 June 1988, art. 14, in *AAS* 80 (1988) 841–930. “Dicasteriorum competentia definitur ratione materiae nisi aliter expresse cautum sit.”

<sup>14</sup> See Davide SALVATORI, “La riserva di alcuni delitti alla Congregazione per la dottrina della fede e la nozione di *delicta graviora*,” in *Quaderni di diritto ecclesiale*, 25 (2012), 260–280; Stefan LOPPACHER, *Processo penale canonico e abuso sessuale su minori: Un’analisi dei recenti sviluppi normativi intorno al “delictum contra sextum cum minore” alla luce degli elementi essenziali di un giusto processo*, Dissertationes: Series Canonica, no. 50, Rome, Pontificia Universitas Sanctae Crucis, 2017, 191–195.

<sup>15</sup> BAURA, “El desarrollo normativo,” 15, fn. 17. “Se ha hecho notar que la reserva de los delitos a la CDF está unida al instituto de la avocación, de manera que, precisamente porque se trata de avocación, se presupone que subsiste la competencia de otro tribunal. En otras palabras, no hay que confundir la reserva con la competencia exclusiva: en primera instancia subsistiría la competencia del tribunal local, de suerte que si la CDF decidiese dar la orden de proceder al tribunal inferior, tal decisión no consistiría en rigor en una prórroga de jurisdicción.... En la práctica, resulta relevante la intervención de las autoridades inferiores

Further details about how this institute functions in the *ius vigens* will be worked out in the following subsections.

## 2.2 — *CIC/1983*

When the *CIC/1983* obtained the force of law on midnight of 27 November 1983,<sup>16</sup> the following were abrogated in virtue of canon 6 § 1: the *CIC/1917* (1°); all contrary laws, unless expressly excepted (2°); all penal laws whatsoever, unless resumed in the code (3°); universal disciplinary laws integrally reordered by the code (4°). This included the abrogation of the 1962 instruction *Crimen sollicitationis*,<sup>17</sup> even though the CDF continued to use it until the promulgation of *Sacramentorum sanctitatis tutela*.<sup>18</sup> The CDF has also stated that, since the matter was integrally reordered, no delicts were reserved to its competence as of 27 November 1983.<sup>19</sup> That is to say, the Latin code does not reserve any *delicts* to the Apostolic See,<sup>20</sup> although

(en la gestión de la *notitia criminis* y, en la mayoría de los casos, en la fase de instrucción). En el caso de que un tribunal inferior juzgase sin la orden de la CDF de proceder, actuaría como un tribunal con incompetencia relativa, con la consecuencia establecida en el can. 1460, § 2. La competencia de la CDF es exclusiva, en cambio, respecto a otros tribunales de la Curia Romana, y en segunda instancia lo es en términos absolutos.”

<sup>16</sup> JOHN PAUL II, apostolic constitution promulgating the *CIC/1983 Sacrae disciplinae leges*, 25 January 1983, XIV, in AAS 75-II (1983), VII–XIV. “... edicimus ac iubemus ut ea vim obligandi sortiantur a die prima Adventus anni MCMLXXXIII.”

<sup>17</sup> PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens synthesim animadversionum ab Em. mis atque Exc. mis Patribus commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsibus a secretaria et consultoribus datis*, 16 July 1981, Vatican City, Typis polyglottis Vaticanis, 1981, 21. “Certo certius instructiones et, si quae sint, leges datae a S. Congregationibus per novum Codicem abrogantur et debent denuo exarari aut promulgari, quod, etsi laboriosum, optimum est pro certitudine iuridica.” Much confusion could have been avoided had this principle been followed.

<sup>18</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Historical Introduction to the Norms of Sacramentorum sanctitatis tutela*, 153, [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html), Vatican English translation in *Origins*, 40 (2010), 152–154 (= CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Historical Introduction*).

<sup>19</sup> *Ibid.* The remission of the *penalty* for five delicts was reserved to the Apostolic See in the *CIC/1983*, but not the competence to judge in first instance. See Joaquín LLOBELL, “Sulla promulgazione delle norme processuali proprie della Congregazione per la Dottrina della Fede in materia penale,” in *IE*, 9 (1997), 290–291; BAURA, “El desarrollo normativo,” 12–13.

<sup>20</sup> *CIC/1983*, c. 1364; cf. *Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II*, Vatican City, Libreria editrice Vaticana, 1990 [hereafter *CCEO/1990*], c. 1437. On this point, see Thomas J. GREEN, “*Sacramentorum Sanctitatis Tutela*: Reflections on the Revised May 2010 Norms on More Serious Delicts,” in *J*, 71 (2011), 128. In the 1917 code,

the remission of the *penalty* in the internal forum for five delicts (some of which are now categorized as *delicta graviora*) was reserved to the Apostolic Penitentiary.<sup>21</sup> The reservation of the remission of *penalties* in the *internal* forum should not be confused with the reservation of *delicts*—that is to say, with the reservation of the penal process to impose or declare penalties in the *external* forum.<sup>22</sup> Again, the CDF has stated that, as of 27 November 1983, “canonical trials [were to be] held in the dioceses.”<sup>23</sup> Appeals from judicial sentences [were to be] presented to the Roman Rota,<sup>24</sup> whereas administrative recourses against penal decrees [were] presented to the Congregation for the Clergy.”<sup>25</sup> One must conclude, therefore, that no delicts were reserved to the CDF at this time.

### 2.3 — Pastor bonus

The apostolic constitution on the Roman Curia, *Pastor bonus*, did not reserve any delicts to the CDF. It simply stated that the CDF “examines the *delicta contra fidem* and also the *graviora delicta*.”<sup>26</sup> This clearly granted the CDF judicial competence in these matters, but it does not appear that this competence was understood as reservation in the sense defined above.<sup>27</sup> This interpretation is supported by a rescript *ex Audientia*

the diocesan bishop was competent to remit in the external forum the excommunication automatically incurred for the *delicta contra fidem* in the broad sense (c. 2314 § 2); only the *delicta contra fidem* committed by those who published or defended or knowingly and without permission read or retained books promoting apostasy, heresy, or schism were reserved to the Apostolic See (c. 2318 § 1).

<sup>21</sup> LLOBELL, “Sulla promulgazione delle norme processuali,” 290-291.

<sup>22</sup> LOPPACHER, *Processo penale canonico*, 192.

<sup>23</sup> CIC/1983, c. 1419 § 1. “In unaquaque dioecesi et pro omnibus causis iure expresse non exceptis, iudex primae instantiae est Episcopus dioecesanus, qui iudicalem potestatem exercere potest per se ipse vel per alios, secundum canones qui sequuntur.”

<sup>24</sup> CIC/1983, c. 1444 § 1. “Rota Romana iudicat: 1° in secunda instantia, causas quae ab ordinariis tribunalibus primae instantiae diiudicatae fuerint et ad Sanctam Sedem per appellationem legitimam deferantur.”

<sup>25</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Historical Introduction*, 153.

<sup>26</sup> *Pastor bonus*, art. 52. “Delicta contra fidem necnon graviora delicta tum contra mores tum in sacramentorum celebratione commissa, quae ipsi delata fuerint, cognoscit atque, ubi opus fuerit, ad canonicas sanctiones declarandas aut irrogandas ad normam iuris, sive communis sive proprii, procedit.”

<sup>27</sup> Again, competence to judge (*cognoscere*) must not be confused with *exclusive* competence or reservation. In Roman law, the *cognitio* is “the examination of a judicial case (and eventually a decision) by a magistrate or a juror (*iudex*). The *cognitio* comprehends all that is done by the judicial authority during the proceedings, civil or criminal, in order to establish the facts which led to the controversy (hearing of the parties and their counselors,

dated 25 April 1994, in which John Paul II granted several privileges *ad quinquennium* to the United States Conference of Catholic Bishops regarding the *delictum gravius contra sextum* (c. 1395 § 2). The rescript explicitly stated that “the Holy Father has not granted any derogation with regard to canon 1444 § 1.”<sup>28</sup> In other words, the diocesan tribunal remained the ordinary tribunal of first instance, the Roman Rota the tribunal of second, third, or further instance.<sup>29</sup> As pointed out at the time by Llobell and recently by Baura, such a statement only makes sense if the delict in question was *not* reserved to the CDF.<sup>30</sup>

Subsequent to the promulgation of *Pastor bonus* and the 1994 rescript, the *Regolamento generale della Curia Romana* asserted the “exclusive” competence of the CDF.

Delicts against the faith and the *graviora delicta* against morals and those committed in the celebration of the sacraments, as well as questions concerning the “*privilegium fidei*,” are always and exclusively referred to the judgment of the Congregation for the Doctrine of the Faith, in accordance with articles 52 and 53 of the apostolic constitution *Pastor bonus*.<sup>31</sup>

of witnesses and experts, examination of documents and other means of evidence). The extension of the activity, termed as *causae cognitio*, depended upon the competence of the inquiring person (*qui cognoscit*) as well upon the matter involved in the *causae cognitio*. Thus, for instance, the *causae cognitio* by the praetor took one form when he was requested to grant an *in integrum restitutio* and another when he ordered a *missio in possessionem* or a *cautio*, or appointed a guardian. The *cognitio* also differed in the various strata of the Roman civil procedure. In criminal matters, *cognitio* covers the whole proceeding, judgment included.” A. BERGER (ed.), *Encyclopedic Dictionary of Roman Law*, s.v. “*cognitio*.”

<sup>28</sup> SECRETARIAT OF STATE, rescript *ex Audientia* granting quinquennial privileges to the United States Conference of Catholic Bishops regarding canons 1395 § 2 and 1362 § 1, 2°, Prot. No. 346.053, 25 April 1994, 210, in *StC*, 33 (1999), 208–211 (= SECRETARIAT OF STATE, Rescript/1994). “Nihil derogationis Beatissimus Pater concessit, quod attinet ad c. 1444, § 1.” These “derogations” are, in fact, privileges; see Brian Thomas AUSTIN, “*Nullum crimen, nulla poena sine lege*: the Principle of Penal Legality in the *ius vigens*,” in *StC*, 54 (2020), 22–27 (= AUSTIN, “*Nullum crimen*”).

<sup>29</sup> *CIC*/1983, c. 1444 § 1. “Rota Romana iudicat: 1° in secunda instantia, causas quae ab ordinariis tribunalibus primae instantiae diiudicatae fuerint et ad Sanctam Sedem per appellationem legitimam deferantur.”

<sup>30</sup> LLOBELL, “Sulla promulgazione delle norme processuali,” 297–298; BAURA, “El desarrollo normativo,” 13.

<sup>31</sup> SECRETARIAT OF STATE, rescript *ex Audientia* promulgating *Ordinatio generalis Romanae Curiae*, 30 April 1999, art. 128 § 2, in *AAS*, 91 (1999), 629–699, updated text containing the modifications as of 28 November 2011. “Vanno rimessi sempre ed esclusivamente al giudizio della Congregazione per la Dottrina della Fede i delitti contro la fede e i più gravi delitti contro la morale e quelli commessi nella celebrazione dei Sacramenti, nonché le

Did the *Regolamento* derogate from the code, such as to exclude the competence of ordinary tribunals in first instance or the Roman Rota in second instance? Against such an extensive, “maximalist”<sup>32</sup> interpretation stand the above arguments, together with the official, contrary interpretation by the CDF itself: “During this period (1994–2001) no reference was made to the previous competence of the Holy Office over such cases.”<sup>33</sup> Therefore, one must harmonize the *Regolamento* with the earlier law (c. 21); when matters of this kind were referred to the Apostolic See, the CDF enjoyed a competence to judge them in first instance, exclusive of the competence of other dicasteries of the Roman Curia. Ordinaries or hierarchs who chose to judge such matters themselves in first instance retained their competence to do so.

## 2.4 — CCEO/1990

No delicts were reserved to the Apostolic See in the *CCEO/1990*. The absolution from two *sins*, however, is reserved to the Apostolic Penitentiary.<sup>34</sup>

## 2.5 — SST/2001

The normative situation changed dramatically on 30 April 2001, when John Paul II signed the apostolic letter *Sacramentorum sanctitatis tutela*. As the effective date of *SST/2001* is disputed, the following argument is provided. Normally, “universal ecclesiastical laws are promulgated by publication in the official commentary *Acta Apostolicae Sedis* ... and obtain the force [of law] only after three months from the day on which [they] appeared in the particular issue of the *Acta*.”<sup>35</sup> “In particular cases,” however, the law

questioni concernenti il ‘privilegium fidei’, a norma degli artt. 52 e 53 della Cost. ap. *Pastor bonus*.”

<sup>32</sup> LLOBELL, “Sulla promulgazione delle norme processuali,” 291. “D’altra parte, le norme sulla Curia Romana esplicitano meglio la competenza della Congregazione per la dottrina della fede, quantunque ciò sia indicato in modo genericamente massimalista.”

<sup>33</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Historical Introduction*, 153.

<sup>34</sup> *CCEO/1990*, c. 728 § 1. “Sedi Apostolicae reservatur absolvere a sequentibus peccatis: 1° directae violationis sigilli sacramentalis; 2° absolutionis complicitis in peccato contra castitatem.”

<sup>35</sup> *CIC/1983*, c. 8 § 1. “Leges ecclesiasticae universales promulgantur per editionem in *Actorum Apostolicae Sedis commentario officiali* ... et vim suam exerunt tantum expletis tribus mensibus a die qui *Actorum* numero appositus est.”



also foresees the possibility of promulgating laws in “another way.”<sup>36</sup> In this particular case, the legislator chose to promulgate the norms by means of the apostolic letter *SST/2001* itself. “With this, our apostolic letter given *motu proprio*, we have completed the work [of revising the norms], and therefore by means of it, we do promulgate the *Normae de gravioribus delictis Congregationi pro Doctrina Fidei reservatis*.”<sup>37</sup> The legislator also determined “specially and expressly ... in the law itself”<sup>38</sup> a shorter *vacatio legis*. “These norms obtain the force of law on the same day on which they were promulgated;”<sup>39</sup> that is to say, on 30 April 2001. On 18 May 2001, the CDF sent a letter “to the bishops and other concerned ordinaries and hierarchs of the entire Catholic Church,”<sup>40</sup> informing them that new norms regarding *graviora delicta* had been “approved, confirmed, and promulgated by the Supreme Pontiff himself, by means of the apostolic letter given *motu proprio* beginning with the words *Sacramentorum sanctitatis tutela*.”<sup>41</sup> The letter of the CDF went on to communicate the *substance* of the norms to them.<sup>42</sup> Although the pope’s prefatory letter was subsequently published in the

<sup>36</sup> *CIC/1983*, c. 8 § 1. “... nisi in casibus particularibus alius promulgandi modus fuerit praescriptus.”

<sup>37</sup> *SST/2001*, 738. “Hisce Nostris Litteris Apostolicis Motu Proprio datis hoc opus perfecimus ideoque per eas promulgamus *Normas de gravioribus delictis Congregationi pro Doctrina Fidei reservatis*.” In the preface to *SST/2010*, Cardinal Levada referred to this juridic fact when he referred to the “*Normae ... die xxx mensis Aprilis anno Domini MMI promulgatae*” (*SST/2010*, 419).

<sup>38</sup> *CIC/1983*, c. 8 § 1. “... in ipsa lege ... specialiter et expresse.”

<sup>39</sup> *SST/2001*, 739. “Ipsae Normae vim legis exserunt eadem die qua promulgatae sunt.” For a concurring opinion, see CANON LAW SOCIETY OF AMERICA, *Revised Guide to the Implementation of the US Bishops’ Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, Washington, DC, Canon Law Society of America, 2004, 372. For a dissenting opinion, see Thomas J. GREEN, “Clerical Sexual Abuse of Minors: Some Canonical Reflections,” in *J*, 63 (2003), 372 (= GREEN, “Clerical Sexual Abuse”); idem, “*Sacramentorum Sanctitatis Tutela*,” 121, fn. 7. The author hereby retracts the opinion expressed in Brian Thomas AUSTIN, “Due Process of Law and the USCCB *Essential Norms*,” in *StC*, 51 (2017), 70, fn. 84 (= AUSTIN, “Due Process”).

<sup>40</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, letter concerning the graver delicts reserved to the CDF *Ad exsequendam*, 18 May 2001, 785, in *AAS*, 93 (2001), 785–788, Latin with English translation in WOESTMAN (ed.), *Ecclesiastical Sanctions*, 310–313. “... ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarchas quorum interest.”

<sup>41</sup> *Ibid.*, 786. “Quae omnia ab ipso Summo Pontifice adprobata, confirmata et promulgata sunt per Litteras Apostolicas Motu Proprio datas, quarum initium sumit a verbis *Sacramentorum sanctitatis tutela*,” emphasis added.

<sup>42</sup> *Ibid.*, 786–788.

5 November 2001 issue of the *Acta*, the norms themselves have never been officially published.<sup>43</sup>

It is important to note that, although the *delicta graviora* as defined in articles 2–4 were explicitly reserved to the CDF, the *delicta contra fidem* were not. One must conclude, therefore, that the *delicta contra fidem* were not reserved to the CDF at this time.

## 2.6 — Subsequent Modifications

Most unfortunately for juridic certainty, in addition to the fact that the 2001 norms were never officially published, a number of modifications were made in rapid succession. For example, on 7 November 2002, John Paul II authorized the CDF “to derogate from the terms of prescription on a case-by-case basis, at the motivated request of individual bishops.”<sup>44</sup> Due to the complexity of this authorization, it will be treated in a separate section below.

On 7 February 2003, an unpublished rescript *ex Audientia* was issued which broadened the CDF’s competence with respect to delicts against the sanctity of the sacrament of penance. First, the rescript reserved the *indirect* violation of the sacramental seal to the CDF,<sup>45</sup> thus implicitly derogating from the *CIC*/1983 (c. 1388 § 1) and *CCEO*/1990 (c. 1456 § 1). Secondly, it

<sup>43</sup> As Martens correctly states, “The absence of an official publication of these norms is incomprehensible.” Kurt MARTENS, “Les délits les plus graves réservés à la Congrégation pour la doctrine de la foi,” in *RDC*, 56 (2006), 218. “L’absence d’une publication officielle de ces normes n’est pas compréhensible.”

<sup>44</sup> JOHN PAUL II, rescript *ex Audientia* authorizing the CDF to derogate from the terms of prescription, 7 November 2002 (= Rescript/2002), in WOESTMAN, *Ecclesiastical Sanctions*, 314. “... *di derogare ai termini della prescrizione, caso per caso, su motivata domanda dei singoli Vescovi*.” Woestman does not cite his source for this text; to the best of this author’s knowledge, it was never officially published. Kaslyn writes: “... in two private February 2003 audiences with Cardinal Ratzinger, ... John Paul II ... promulgated a specific number of emendations, dispensations, derogations and faculties. ... These ... texts are gathered together in an unpublished and unpaginated photocopy entitled *Decisiones Summi Pontificis*.” Robert J. KASLYN, “Three Legal Texts and their Interconnection: an Overview,” in *J*, 65 (2005), 120, fn. 2. The format of Brown’s citation, however, seems to indicate publication in Vatican City, 2002. Phillip J. BROWN, “Prescription and Statutes of Limitation,” in *CLSAP*, 70 (2008), 424, fn. 168 (= “Prescription and Statutes of Limitation”). This author has written to various officials of the CDF on several occasions, but to date nothing official has yet been produced.

<sup>45</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, rescript *ex Audientia* granting three faculties to the CDF regarding *SST*/2001, 7 February 2003, Italian original with English translation in WOESTMAN (ed.), *Ecclesiastical Sanctions*, 314–316. “... violatio ... indirecta sigilli sacramentalis, de qua in can. 1388 § 1 *CIC* et in can. 1456 § 1 *CCEO*.”

also reserved to the CDF the delict regarding the recording or divulging by any technical means anything said in the context of sacramental confession.<sup>46</sup> This delict had been established earlier by an undated general decree<sup>47</sup> issued by the CDF, subsequently published in the *Acta* on 23 September 1988 (on which day it obtained the force of law).<sup>48</sup> It is important to note that the general decree itself had *not* reserved this delict to the CDF. Presumably, the rescript took effect on 7 February 2003, on which date this delict was also reserved;<sup>49</sup> the rescript was subsequently confirmed by Benedict XVI on 6 May 2005.<sup>50</sup>

On 19 December 2007, the CDF issued another general decree<sup>51</sup> establishing that “the one who attempts to confer sacred ordination upon a woman, as well as the woman who attempts to receive sacred ordination, incurs a *latae sententiae* excommunication reserved to the Apostolic See.”<sup>52</sup> The same decree established that “this decree shall obtain the force of law as soon as it shall be published in *L'Osservatore Romano*,”<sup>53</sup> which occurred on 30 May 2008. Although this general decree did not *explicitly* reserve this new delict (but only the remission of the penalty), it may be said to have done so *implicitly*. That is to say, subsequent to the promulgation of

<sup>46</sup> Ibid. “... captio quovis technico instrumento facta aut evulgatio socialis communicationis instrumentis operata earum quae in sacramentali confessione a confessario vel a poenitente dicuntur.”

<sup>47</sup> The *Acta* simply titles it a “decree.” The decree in question is the general (legislative) decree of canon 30, as is made explicit in the text itself: “... vigore specialis facultatis sibi a Suprema Ecclesiae auctoritate tributae (can. 30).” CONGREGATION FOR THE DOCTRINE OF THE FAITH, general decree establishing a new delict for the recording or divulging of a sacramental confession by any technical means, 23 September 1988, in AAS, 80 (1988), 1367.

<sup>48</sup> Ibid. “Firmo praescripto can. 1388, quicumque quovis technico instrumento ea quae in Sacramentali Confessione, vera vel ficta, a se vel ab alio peracta, a confessario vel a poenitente dicuntur, captat, aut communicationis socialis instrumentis evulgat, in excommunicationem latae sententiae incurrit. ... Decretum hoc vigere incipit a die promulgationis.”

<sup>49</sup> See, e.g., GREEN, “*Sacramentorum Sanctitatis Tutela*,” 132.

<sup>50</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, breve relazione circa le modifiche introdotte nelle *Normae de gravioribus delictis* riservati alla Congregazione per la Dottrina della Fede *Nel nuovo testo*, 21 May 2010, 432, in AAS, 102 (2010), 432–434.

<sup>51</sup> Dicasteries are not ordinarily competent to issue general decrees; nevertheless, it was granted in this case, “vigore specialis facultatis sibi a suprema Ecclesiae auctoritate in casu tributae (cfr. can. 30 *Codici Iuris Canonici*).” CDF, decretum generale de delicto attentatae sacrae ordinationis mulieris *Congregatio pro Doctrina Fidei*, 19 December 2007, in AAS, 100 (2008), 403.

<sup>52</sup> Ibid. “... tum quicumque sacrum ordinem mulieri conferre, tum mulier quae sacrum ordinem recipere attentaverit, in excommunicationem *latae sententiae* Sedi Apostolicae reservatam incurrit.”

<sup>53</sup> Ibid. “Hoc decretum cum in *L'Osservatore Romano* evulgabitur, statim vigere incipiet.”

*SST/2001*, it is clearly the intention of the legislator to reserve the *graviora delicta* concerning the celebration of the sacraments to the CDF in the external forum (cf. c. 17). Any doubt in this regard was removed by its explicit reservation to the CDF in *SST/2010* (art. 5).

## 2.7 — *SST/2010*

On 21 May 2010, in virtue of a rescript *ex Audientia*, *SST/2001* was revised. Unlike its predecessor, the new *Normae de gravioribus delictis* were published in the *Acta*. Since *SST/2010* did not specify a different mode of promulgation or a longer or shorter *vacatio legis*, it obtained the force of law on 2 October 2010, three months after its publication on 2 July 2010 (c. 8 § 1).

### 2.7.1 — *Reservation ratione materiae*

*SST/2010* reserved the *delicta contra fidem* to the CDF, but the manner of their reservation is different from that of the *graviora delicta*. The first article of *SST/2010* states that the Supreme Tribunal of “the Congregation for the Doctrine of the Faith ... examines the *delicta contra fidem*, as well as the *graviora delicta* committed against morals and in the celebration of the sacraments.”<sup>54</sup> This simply restates the competency granted by *Pastor bonus* (art. 52), although it remains significant since *SST/2001* had not mentioned the *delicta contra fidem*. With respect to all these delicts, the CDF also has the right, “with the previous mandate of the Roman pontiff, to judge cardinals, patriarchs, legates of the Apostolic See, bishops, as well as other physical persons mentioned in canon 1405 § 3 of the *Code of Canon Law* and in can. 1061 of the *Code of Canons of the Eastern Churches*.”<sup>55</sup> Were

<sup>54</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *SST/2010*, art. 1 § 1. “Congregatio pro Doctrina Fidei, ad normam art. 52 Constitutionis Apostolicae *Pastor bonus*, cognoscit delicta contra fidem et delicta graviora, tum contra mores tum in sacramentorum celebratione commissa;” cf. *Pastor bonus*, art. 52. “Delicta contra fidem necnon graviora delicta tum contra mores tum in sacramentorum celebratione commissa, quæ ipsi delata fuerint, cognoscit atque, ubi opus fuerit, ad canonicas sanctiones declarandas aut irrogandas ad normam iuris, sive communis sive proprii, procedit.”

<sup>55</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *SST/2010*, art. 1 § 2. “In delictis de quibus in § 1 Congregationi pro Doctrina Fidei ius est, de praevio mandato Romani Pontificis, iudicandi Patres Cardinales, Patriarchas, Legatos Sedis Apostolicae, Episcopos, necnon alias personas physicas de quibus in can. 1405 § 3 *Codicis Iuris Canonici* et in can. 1061 *Codicis Canonum Ecclesiarum Orientalium*.” This power was granted to the CDF at an unspecified date between 30 April 2001 and 19 April 2005, and was confirmed by Benedict XVI on

it not for the addition of the word “*reservata*” to article 1 § 3,<sup>56</sup> it could be argued that *only* the *graviora delicta* (arts. 3–6) were reserved to the CDF. That is to say, articles 3–6 are very careful always to include the word “*reservata*” when referring to the *graviora delicta*, which article 2 does not. Nevertheless, “the proper meaning of the words, considered in their text and context,” (c. 17) indicates that the *delicta contra fidem* are now also reserved to the CDF.<sup>57</sup>

This reservation of the *delicta contra fidem*, however, must not be confused with exclusive competence. *SST/2010* simply repeats the disposition of the codes when it states that the judgement of the *delicta contra fidem* belongs to the ordinary or hierarchy in first instance,<sup>58</sup> unless further reserved *ratione personae*.<sup>59</sup> One must agree with Green, therefore, that “the CDF is not exclusively competent”<sup>60</sup> to examine the *delicta contra fidem*; rather, the CDF is exclusively competent to judge them only in second instance.<sup>61</sup> It is in this restricted sense, then, that the *delicta contra fidem* are now reserved to the CDF. Since it cannot be demonstrated with certainty on the basis of officially published norms that the *delicta contra fidem* were reserved to the CDF before *SST/2010*, the twenty-year period of prescription only applies to

6 May 2005; IDEM, *Nel nuovo testo*, brief report, 432. For further details, see Claudio PAPALE, “Particolarità procedurali nei casi di *delicta reservata*,” in C. PAPALE (ed.), *La procedura nei delitti riservati alla Congregazione per la Dottrina della Fede*, Rome, Urbaniana University Press, 2018, 99–101 (= PAPALE, “Particolarità procedurali”).

<sup>56</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *SST/2010*, art. 1 § 3. “*Delicta reservata de quibus in § 1 Congregatio pro Doctrina Fidei cognoscit ad normam articulorum qui sequuntur*,” cf. JOHN PAUL II, *SST/2001*, art. 1 § 2. “*Delicta de quibus in § 1 Congregatio pro Doctrina Fidei cognoscit ad normam articulorum qui sequuntur*.”

<sup>57</sup> John Paul KIMES, “Considerazioni generali sulla riforma legislativa del motu proprio *Sacramentorum sanctitatis tutela*,” in A. D’AURIA AND C. PAPALE (eds.), *I delitti riservati alla Congregazione per la Dottrina della Fede*, Vatican City, Urbaniana University Press, 2014, 18 (= D’AURIA AND PAPALE [eds.], *I delitti riservati*); PAPALE, “Particolarità procedurali,” 103; LOPPACHER, *Processo penale canonico*, 192.

<sup>58</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *SST/2010*, art. 2 § 2. “*In casibus de quibus in § 1 Ordinarii vel Hierarchae est, ad normam iuris, excommunicationem latae sententiae, si casus ferat, remittere, processum sive iudicalem in prima instantia sive per decretum extra iudicium agere, salvo iure appellandi seu recurrendi ad Congregationem pro Doctrina Fidei*.”

<sup>59</sup> *Ibid.*, art. 1 § 2.

<sup>60</sup> GREEN, “*Sacramentorum Sanctitatis Tutela*,” 128.

<sup>61</sup> SECRETARIAT OF STATE, rescript *ex Audientia* instituting the procedure of exclusive recourse internal to the CDF, 14 February 2003, Italian original with English translation in WOESTMAN (ed.), *Ecclesiastical Sanctions*, 316; cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *SST/2010*, art. 16. “*... iure appellandi contra sententiam primi gradus tantummodo ad Supremum Tribunal eiusdem Congregationis*.” The 2003 rescript *ex Audientia* thus implicitly derogated from canon 1444 § 1, 1°, which had assigned this competence to the Roman Rota.

those *delicta contra fidem* alleged to have occurred after midnight of 2 October 2010; if they are alleged to have occurred before this date, the ordinary three-year period of prescription applies.

### 2.7.2 — *Reservation ratione personae*

No one is competent in law to judge the Roman pontiff (c. 1404). The judgement of cases mentioned in canon 1401<sup>62</sup> of those who hold the highest civil office of a state (c. 1405 § 1, 1°), cardinals (2°), patriarchs (*CCEO*/1990, c. 1060 § 1, 1°), legates of the Apostolic See, and, in penal cases, bishops (c. 1405 § 1, 3°) is reserved *ratione personae* to the Roman pontiff. Further, no judge is competent “to review an act or instrument confirmed *in forma specifica* by the Roman pontiff without his prior mandate” (c. 1405 § 2). The nature of the reservation of cases to the Roman pontiff is such that, “In the cases mentioned in canon 1405, the incompetence of other judges is absolute” (c. 1406 § 2).<sup>63</sup>

In addition to the delicts specified in *SST*/2010, the CDF “also judges other delicts of which a defendant is accused by the promotor of justice, *ratione conexionis personae* and complicity.”<sup>64</sup> That is to say, if the CDF is already competent to judge a person in some other case, then, “in the interests of procedural economy, [its competence] extends even to other non-reserved delicts”<sup>65</sup> connected to the case.<sup>66</sup> This competence *ratione conexionis personae* does not alter the period of prescription for the non-reserved delict. For example, if a bishop should be denounced for having committed the delict of abuse of office (non-reserved) in connection with the delict of the sexual abuse of a minor (reserved), the two delicts would be judged by the same process, but according to different periods of prescription.

<sup>62</sup> *CIC*/1983, c. 1401. “By proper and exclusive right the Church adjudicates: 1° cases which regard spiritual matters or those connected to spiritual matters; 2° the violation of ecclesiastical laws and all those matters in which there is a question of sin, in what pertains to the determination of culpability and the imposition of ecclesiastical penalties.”

<sup>63</sup> For further details regarding the competency of the CDF, see GREEN, “*Sacramentorum Sanctitatis Tutela*,” 127–128.

<sup>64</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *SST*/2010, art. 8 § 2. “Hoc Supremum Tribunal cognoscit etiam alia delicta, de quibus reus a Promotore Iustitiae accusatur ratione conexionis personae et complicitatis.”

<sup>65</sup> GREEN, “*Sacramentorum Sanctitatis Tutela*,” 143.

<sup>66</sup> Cf. *CIC*/1983, c. 1414. “Ratione conexionis, ab uno eodemque tribunali et in eodem processu cognoscendae sunt causae inter se conexas, nisi legis praescriptum obstat.”

## 2.8 — *Vos estis lux mundi*

Since 1 June 2019, in virtue of the apostolic letter *Vos estis lux mundi* (*VELM*), even the preliminary investigation of certain delicts<sup>67</sup> is reserved,<sup>68</sup> *ratione materiae et personae*, when the allegation concerns:

- a) cardinals, patriarchs, bishops, and legates of the Roman Pontiff;
- b) clerics who are, or who have been, the pastoral heads of a particular Church or of an entity assimilated to it, Latin or Oriental, including the personal ordinariates, for acts committed *durante munere*;
- c) clerics who are or who have been in the past leaders of a personal prelate, for acts committed *durante munere*;
- d) those who are, or who have been, supreme moderators of Institutes of Consecrated Life or of Societies of Apostolic Life of pontifical right, as well as of monasteries *sui iuris*, with respect to acts committed *durante munere*.<sup>69</sup>

It is important to bear in mind that, in cases governed by *SST/2010*, the preliminary investigation is commenced by the ordinary or the hierarch who

<sup>67</sup> FRANCIS, apostolic letter *motu proprio* instituting new procedures for the preliminary investigation of allegations of the sexual abuse of minors or other vulnerable persons involving prelates *Vos estis lux mundi*, 7 May 2019, [http://w2.vatican.va/content/francesco/it/motu\\_proprio/documents/papa-francesco-motu-proprio-20190507\\_vos-estis-lux-mundi.html](http://w2.vatican.va/content/francesco/it/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html), in AAS, 111 (2019) (= *VELM*). “Art. 1 § 1. These norms apply to reports regarding clerics or members of Institutes of Consecrated Life or Societies of Apostolic Life and concerning: a) delicts against the sixth commandment of the Decalogue consisting of: i. forcing someone, by violence or threat or through abuse of authority, to perform or submit to sexual acts; ii. performing sexual acts with a minor or a vulnerable person; iii. the production, exhibition, possession or distribution, including by electronic means, of child pornography, as well as by the recruitment of or inducement of a minor or a vulnerable person to participate in pornographic exhibitions; b) conduct carried out by the subjects referred to in article 6, consisting of actions or omissions intended to interfere with or avoid civil investigations or canonical investigations, whether administrative or penal, against a cleric or a religious regarding the delicts referred to in letter a) of this paragraph. § 2. For the purposes of these norms, a) “minor” means: any person under the age of eighteen, or who is considered by law to be the equivalent of a minor; b) “vulnerable person” means: any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offence; c) “child pornography” means: any representation of a minor, regardless of the means used, involved in explicit sexual activities, whether real or simulated, and any representation of sexual organs of minors for primarily sexual purposes.”

<sup>68</sup> If the delict is already reserved *ratione materiae* to the CDF, that dicastery remains competent; otherwise, the competent dicasteries are those specified in *VELM*, art. 7 § 1.

<sup>69</sup> FRANCIS, *VELM*, art. 6.

received the report (art. 16).<sup>70</sup> In cases governed by *VELM*, however, the metropolitan (or senior suffragan) must request “from the competent dicastery, to be assigned to commence the [preliminary] investigation” (art. 10 § 1).

### 3 — Determination of the Prescription of Action

To determine whether or not the criminal action arising from the alleged delict has been extinguished by prescription, one must ascertain: 1) the specific nature of the alleged delict(s); 2) the date(s) on which the alleged delict(s) occurred; 3) the date of birth of the delator. The correct determination of prescription is not a matter simply of discovering the date of the alleged delict and applying the law then in force; rather, one must compare all of the substantive laws—from the time of the alleged delict to the present—and apply the most favourable law (*CIC*/1983, c. 1313; *CCEO*/1990, c. 1412 §§ 2–3). This section, therefore, will treat: 1) each delict currently reserved to the CDF, in the order in which they appear in *SST*/2010; 2) the particular law for the USCCB; 3) non-reserved delicts.

#### 3.1 — Delicts Reserved to the CDF

The current period of prescription for all *delicta reservata* is twenty years (*SST*/2010, art. 7 § 1). This period of prescription applies to *delicta contra fidem* alleged to have occurred after midnight of 2 October 2010; to *delicta graviora*, after midnight of 6 May 2005. According to the special norms earlier in force, *delicta graviora* alleged to have occurred between 30 April 2001 and 6 May 2005 are subject to the ten-year period (*SST*/2001, art. 5 § 1). With the exception of the *delictum gravius contra sextum cum minore*, “Prescription runs from the day on which the delict was committed or, if the delict is continuous or habitual, from the day on which it ceased.”<sup>71</sup> Time must be computed *continuously* with respect to all delicts, and is suspended for three years when the accused is cited (in a judicial process) or informed of the accusation (in an extrajudicial process).<sup>72</sup> The determination of the *terminus a quo* for the *delictum gravius cum minore* will be treated in its

<sup>70</sup> If the preliminary investigation should have been omitted, it may be carried out by the CDF (*SST*/2010, art. 17).

<sup>71</sup> *CIC*/2021, c. 1362 § 2. “Praescriptio, nisi aliud in lege statuatur, decurrit ex die quo delictum patratum est, vel, si delictum sit permanens vel habituale, ex die quo cessavit;” cf. *SST*/2010, art. 7 § 2. Identical text at *CCEO*/1990, c. 1152 § 3.

<sup>72</sup> *CIC*/2021, c. 1362 § 3.



proper place. The question regarding the power of the CDF “to derogate from prescription in individual cases”<sup>73</sup> will be treated in its own section.

### 3.1.1 — *Faith*

The *delicta contra fidem* reserved to the CDF are “heresy, apostasy, and schism, according to the norm of canons 751 and 1364 of the *Codex Iuris Canonici* and canons 1436 § 1 and 1437 of the *Codex Canonum Ecclesiarum Orientalium*.”<sup>74</sup> The period of prescription for these delicts alleged to have been committed after midnight of 2 October 2010 is twenty years. If they are alleged to have been committed before this date, they are subject to the three-year period of prescription.

### 3.1.2 — *Eucharist*

The period of prescription for the *delicta graviora* against the sanctity of the Eucharist (SST/2010, art. 3) alleged to have been committed after midnight of 6 May 2005 is twenty years. Taking the definitions of these delicts according to SST/2010 (art. 3 § 1), the earlier periods are:

1° (desecration): before 30 April 2001, three years; between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

2° (attempted celebration): before 30 April 2001, three years; between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

3° (simulation): before 27 November 1983, not classified as a delict;<sup>75</sup> between 27 November 1983 and 30 April 2001, three years; between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

4° (forbidden concelebration): before 30 April 2001, three years; between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

§ 2a (sacrilegious consecration of only one species during Mass, or of one or both outside of Mass): before 30 April 2001, not classified as a delict;<sup>76</sup> between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

<sup>73</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, SST/2010, art. 7 § 1. “... a praescriptione derogandi pro singulis casibus.”

<sup>74</sup> Ibid., art. 2 § 1. “Delicta contra fidem, de quibus in art. 1, sunt haeresis, apostasia atque schisma, ad normam cann. 1351 et 1364 Codicis Iuris Canonici et cann. 1436 § 1 et 1437 Codicis Canonum Ecclesiarum Orientalium.”

<sup>75</sup> The delict was an innovation of CIC/1983, c. 1379.

<sup>76</sup> This delict was an innovation of SST/2001, art. 2 § 2.

§ 2b (sacrilegious consecration of both species during Mass): before 2 October 2010, not classified as a delict;<sup>77</sup> after 2 October 2010, twenty years.

The two versions of *SST* are substantially equivalent here, except on one point. A careful reading of the texts reveals that the revised article 3 filled an important lacuna in article 2: the earlier text had neglected to establish the consecration for a sacrilegious purpose of *both* species *within* the context of a Eucharistic celebration as a reserved delict.<sup>78</sup> If this specific offense is alleged to have been committed before midnight of 2 October 2010, it can only be prosecuted according to canon 1384 (illegitimate priestly function) or canon 1389 § 1 (abuse of office), and is prescribed after three years.<sup>79</sup>

### 3.1.3 — *Penance*

The period of prescription for the *delicta graviora* against the sanctity of the sacrament of Penance (*SST*/2010, art. 4) alleged to have been committed after midnight of 2 October 2010 is twenty years. Taking the definitions of these delicts according to *SST*/2010 (art. 4 § 1), the earlier periods are:

1° (absolution of an accomplice): before 30 April 2001, three years; between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

2° (attempted or forbidden confession of c. 1378 § 2, 2°): before 2 October 2010, three years; after 2 October 2010, twenty years;

3° (simulation): before 2 October 2010, not classified as a delict;<sup>80</sup> after 2 October 2010, twenty years;

4° (solicitation): before 30 April 2001, three years; between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

5°a (direct violation of the seal): before 30 April 2001, three years; between 30 April 2001 and 6 May 2005, ten years; after 6 May 2005, twenty years;

<sup>77</sup> This delict was an innovation of *SST*/2010, art. 3 § 2.

<sup>78</sup> *SST*/2001, art. 2 § 2. “Congregationi pro Doctrina Fidei reservatur quoque delictum quod consistit in consecratione in sacrilegum finem alterius materiae sine altera in eucharistica celebratione, aut etiam utriusque extra eucharisticam celebrationem. Qui hoc delictum patra-verit, pro gravitate criminis puniatur, non exclusa dimissione vel depositione.”

<sup>79</sup> The principle of penal legality, *nullum crimen, nulla poena sine lege stricta*, is fittingly recalled here; cf. cc. 18–19. On this specific point, see AUSTIN, “*Nullum crimen*,” 5–29.

<sup>80</sup> The delict was an innovation of *CIC*/1983, c. 1379.

5°b (indirect violation of the seal): before 7 February 2003, three years; between 7 February 2003 and 6 May 2005, ten years; after 6 May 2005, twenty years;

§ 2 (recorded/transmitted confession): before 23 September 1988, not classified as a delict; between 23 September 1988 and 7 February 2003, three years; between 7 February 2003 and 6 May 2005, ten years; after 6 May 2005, twenty years.

### 3.1.4 — *Holy Orders*

The period of prescription for the *delictum gravius* of the attempted sacred ordination of a woman (*SST/2010*, art. 5) alleged to have been committed after midnight of 30 May 2008 is twenty years. Before 30 May 2008, it was not classified as a delict.

### 3.1.5 — *Morals*

The period of prescription for the *delicta graviora contra mores* (*SST/2010*, art. 6) alleged to have been committed after midnight of 2 October 2010 is (in general) twenty years. The *delictum contra sextum* alleged to have been committed by a cleric is subject to the following periods of prescription:

- 1) with a minor under the age of sixteen years (c. 1395 § 2): before 30 April 2001, five years (c. 1362 § 1, 2°); between 30 April 2001 and 6 May 2005, ten years from the minor's eighteen birthday; after 6 May 2005, twenty years from the minor's eighteenth birthday;
- 2) with a minor over the age of sixteen years (*SST/2001*, art. 4 § 1): before 30 April 2001, not classified as a delict; between 30 April 2001 and 6 May 2005, ten years from the minor's eighteen birthday; after 6 May 2005, twenty years from the minor's eighteenth birthday;
- 3) with a person who habitually lacks the use of reason (cc. 97 § 2; 99): before 30 April 2001, five years (c. 1362 § 1, 2°); between 30 April 2001 and 6 May 2005, ten years from attaining the habitual use of reason; after 6 May 2005, twenty years from attaining the habitual use of reason;<sup>81</sup>
- 4) with a person who habitually has the imperfect use of reason (*SST/2010*, art. 6 § 1, 1°): before 2 October 2010, not classified as a delict; after 2 October 2010, twenty years from attaining the habitual use of reason.<sup>82</sup>

<sup>81</sup> If the habitual use of reason is never attained, this delict is imprescriptible.

<sup>82</sup> If the habitual use of reason is never attained, this delict is imprescriptible.

As of 1 January 2020, the delict regarding pornography is defined as: “The acquisition, possession, or distribution by a cleric of pornographic images of minors under the age of eighteen, for purposes of sexual gratification, by whatever means or using whatever technology.”<sup>83</sup> The periods of prescription are the following:

- 1) images of minors under fourteen: before 2 October 2010, not classified as a delict; after 2 October 2010, twenty years;
- 2) images of minors over fourteen: before 1 January 2020, not classified as a delict; after 1 January 2020, twenty years.

### 3.2 — The USCCB

On 25 April 1994, John Paul II granted several privileges *ad quinquennium* to the United States Conference of Catholic Bishops (at that time called the National Conference of Catholic Bishops) regarding the *delictum contra sextum* (c. 1395 § 2).<sup>84</sup> On 30 November 1998, John Paul II “granted a further ten-year extension of the [privileges] to take effect on 26 April 1999.”<sup>85</sup> These provisions were substantially taken up in SST/2001 on 30 April 2001. Consequently, the *delictum contra sextum* alleged to have been committed by a cleric with a minor in territories subject to the jurisdiction of the USCCB is subject to the following periods of prescription

- 1) with a minor under the age of sixteen years (c. 1395 § 2): before 25 April 1994, five years (c. 1362 § 1, 2°); between 25 April 1994 and 6 May 2005, ten years from the minor’s eighteenth birthday; after 6 May 2005, twenty years from the minor’s eighteenth birthday;
- 2) with a minor over the age of sixteen years: before 25 April 1994, not classified as a delict; between 25 April 1994 and 6 May 2005, ten years from the minor’s eighteenth birthday; after 6 May 2005, twenty years from the minor’s eighteenth birthday.

<sup>83</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, rescript *ex Audientia* modifying SST/2010, 3 December 2019, art. 1, [http://www.vatican.va/roman\\_curia/secretariat\\_state/2019/documents/rc-seg-st-20191203\\_rescriptum\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2019/documents/rc-seg-st-20191203_rescriptum_en.html) (= SST/2019); cf. idem, SST/2010, art. 6 § 1, 2°, which had specified fourteen years. Since all minors are under the age of eighteen, the new formula is logically redundant.

<sup>84</sup> SECRETARIAT OF STATE, Rescript/1994.

<sup>85</sup> SECRETARIAT OF STATE, rescript *ex Audientia* extending the Rescript/1994 for ten years, 30 November 1998, in *StC*, 33 (1999), 212.

### 3.3 — Non-reserved delicts

The revised discipline regarding non-reserved delicts in the Latin Church has already been treated above. The discipline for the Eastern Churches is similar, but not identical. In the first place, the Eastern code explicitly resumed the discipline of *Sollicitudinem Nostram*,<sup>86</sup> itself heavily influenced by the 1917 code.<sup>87</sup> “Every penal action is extinguished by the death of the accused, condonation by the competent authority, and by prescription.”<sup>88</sup> (It is probable that the lacuna in the *CIC*/1983 was due to a simple oversight and may reasonably be filled by the Eastern norm.<sup>89</sup>) As in the *CIC*/1983, the general rule is that “a penal action is extinguished after three years.”<sup>90</sup> Actions for the delicts defined in canons 1450 and 1453 are prescribed after five years (c. 1152 § 2, 2°).<sup>91</sup> Finally, as in the *CIC*/1983, particular law can establish a different

<sup>86</sup> PIUS XII, apostolic letter m.p. de iudiciis pro ecclesia orientali *Sollicitudinem Nostram*, 6 January 1950, c. 222, in *AAS*, 42 (1950), 5–120. “Omnis criminalis actio perimitur morte rei, condonatione legitimae potestatis, et praescriptione.”

<sup>87</sup> *CIC*/1917, c. 1702. “Omnis criminalis actio perimitur morte rei, condonatione legitimae potestatis, et lapsu temporis utilis ad actionem criminalem proponendam.”

<sup>88</sup> *CCEO*/1990, c. 1152 § 1. “Omnis actio poenalis exstinguitur morte rei, condonatione auctoritatis competentis et praescriptione.”

<sup>89</sup> During the revision process, the coetus *de processibus* proposed that the phrase “et lapsu temporis utilis ad actionem criminalem proponendam” (*CIC*/1917, c. 1702) be replaced by the more concise phrase “et praescriptione,” just as *Sollicitudinem Nostram* (c. 222) had done: “[P]out in Cod. Or. (can. 222);” PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, coetus studiorum “De Processibus,” sessio II, 27 February–3 March 1967, 88, in *Comm*, 38 (2006), 61–117. At the same time, it was decided to review canons 1703–1705 after the coetus *de delictis et poenis* discussed them: “Recognitio facienda est postquam Coetus *De delictis et poenis* deliberaverit circa ea quae relationem habent cum istis canonibus;” *ibid.*, 89. “*Cann. 1703–1705*. Recognitio dilata est;” *ibid.*, 117. On 13 May 1967, the coetus *de delictis et poenis* met to discuss canons 32–51 of the *praevia schema canonum* prepared by Pio Ciprotti. Canon 34 read: “Actio criminalis et actio poenalis extinguuntur morte rei, condonatione legitimi superioris, [et] praescriptione;” PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Praevium schema canonum de delictis in genere a Pio Ciprotti apparatus cum adnotationibus, 27 December 1966, 556, in *Comm*, 44 (2012), 549–565. All the consultants agreed to this formulation, without further discussion noted: “Tutti approvano;” *ibid.*, 576. By the time of the 1976 schema, it had been decided that the remainder of the canons dealing with the extinction of criminal and penal actions (cc. 1702–1705) would be reviewed by the coetus *de delictis et poenis*: “Can. 136 (*CIC* 1702). De criminalis et poenalis actionis extinctione servantur canones proprii;” *IDEM*, *Schema canonum de modo procedendi pro tutela iurium seu de processibus*, Vatican City, Typis polyglottis Vaticanis, 1976, 32. From the above *iter*, it is not clear how or why the norm in question was omitted. See Alphonse BORRAS, “Commentary on Canon 1362,” in *Exegetical Comm*, IV/1, 425.

<sup>90</sup> *CCEO*/1990, c. 1152 § 2. “Actio poenalis praescriptione exstinguitur triennio.”

<sup>91</sup> These delicts concern offenses against human life (c. 1450) and various offenses *contra castitatem* committed by a cleric or religious in perpetual vows (c. 1453).

period of prescription for a delict not already punished in common law (c. 1152 § 2, 3<sup>a</sup>). It remains to be seen whether or not the revised discipline of the Latin Church is to be extended to the Eastern Churches.

#### 4 — 2002 Privilege of the CDF

We now must consider the 2002 rescript authorizing the CDF “to derogate from the terms of prescription on a case by case basis, at the motivated request of individual bishops.”<sup>92</sup> Nkouaya Mbandji was the first to publish an analysis of its juridic nature.<sup>93</sup> Relying upon the studies of Huels<sup>94</sup> and McCormack,<sup>95</sup> Nkouaya Mbandji cogently argued that, although the favour has been called a number of different things—faculty, indult, derogation, dispensation—it is best classified as a *privilege*.<sup>96</sup> The following analysis will assume that it is a privilege—a singular administrative act—but will also take into account the fact that it is functionally quite similar to a *lex specialis* for the CDF.

##### 4.1 — Broad or Strict Interpretation?

We must first consider the precise interpretation of the phrase “*di derogare ai termini della prescrizione*.” Since the phrase occurs in a “derogating clause” contained in a singular administrative act—the clause considered either as a privilege or as a singular decree—it is subject to the hermeneutic principles established in canon 36.<sup>97</sup>

<sup>92</sup> JOHN PAUL II, Rescript/2002. “... *di derogare ai termini della prescrizione, caso per caso, su motivata domanda dei singoli Vescovi*.”

<sup>93</sup> Valère NKOUAYA MBANDJI, *La Prescription en droit canonique et dans la tradition du Code de Napoléon avec applications particulières aux délits les plus graves touchant aux mœurs*, Ottawa, Université Saint-Paul, 2018, 187–196 (= NKOUAYA MBANDJI, *La Prescription en droit canonique*). For a review of the published version of this excellent dissertation, see Brian Thomas AUSTIN, “Review of Nkouaya Mbandji, Valère, *La Prescription en Droit Canonique*,” in *StC*, 52 (2018), 645–647.

<sup>94</sup> John M. HUELS, “Privilege, Faculty, Indult, Derogation: Diverse Uses and Disputed Questions,” in *J*, 63 (2003), 213–252 (= HUELS, “Privilege”).

<sup>95</sup> Alan R. A. MCCORMACK, *The Term Privilege: A Textual Study of Its Meaning and Use in the 1983 Code of Canon Law*, Tesi Gregoriana, Serie Diritto Canonico, no. 23, Rome, Pontificia Università Gregoriana, 1997 (= MCCORMACK, *The Term Privilege*).

<sup>96</sup> For a résumé of Nkouaya Mbandji’s argument, see AUSTIN, “Nullum crimen, nulla poena sine lege,” 22–27.

<sup>97</sup> CIC/1983, c. 36. “§ 1. Actus administrativus intellegendus est secundum propriam verborum significationem et communem loquendi usum; in dubio, qui ad lites referuntur aut ad poenas comminandas infligendasve attinent aut personae iura coarctant aut iura aliis quaesita

In the first place, then, we have to try to understand the phrase “according to the proper signification of the words and the common way of speaking” (c. 36 § 1). Unfortunately, the phrase “*derogare ai termini della prescrizione*” is ambiguous. It can mean either 1) “to derogate from the *terms* of prescription”—that is to say, from the *terminus a quo* and the *terminus ad quem* of a particular period of prescription; or 2) “to derogate from the *periods* of prescription”—that is to say, from the *length* of a particular period of prescription. Both meanings of *termini* are attested to in, for example, Italian penal law.<sup>98</sup> The first meaning would seem to grant the power to the CDF to resurrect and prosecute criminal actions already extinguished by prescription (*broad* interpretation). The second meaning could also have this broad interpretation, or it could have the more restrictive interpretation of granting the power to the CDF not to observe the *terminus ad quem* in a particular case—that is to say, to extend indefinitely the period of prescription with respect to a particular criminal action which has not yet been extinguished by prescription (*strict* interpretation).

Since the meaning of the phrase is doubtful, we must determine whether the derogating clause in question is subject to a strict or broad interpretation. Canon 36 § 1 establishes:

When in doubt [about the proper signification of the words and the common way of speaking], [singular administrative acts] which refer to lawsuits, or pertain to threatening or inflicting penalties, or restrict the rights of a person, or harm the acquired rights of others, or are opposed to a law in favour of private persons, are subject to strict interpretation; all other [singular administrative acts are subject to] broad [interpretation].<sup>99</sup>

Considering the derogating clause contained in the rescript as a decree, the clause clearly pertains to the threatening or inflicting of penalties, and may also harm rights already acquired by prescription; as such, it must be interpreted strictly.<sup>100</sup> Considering the derogating clause as a privilege, we must also apply the hermeneutic principles established in canon 77: “A privilege

laedunt aut adversantur legi incommodum privatorum, strictae subsunt interpretationi; ceteri omnes, latae. § 2. Actus administrativus non debet ad alios casus praeter expressos extendi.” Cf. *CIC*/1983, cc. 17–20.

<sup>98</sup> Italy, *Penal Code* (1930), arts. 14; 157; Italy, *Penal Procedural Code* [Codice di procedura penale], 22 September 1988, <https://www.brocardi.it/codice-di-procedura-penale>, arts. 47 § 4; 70 § 3.

<sup>99</sup> *CIC*/1983, c. 36 § 1. “... in dubio, qui ad lites referuntur aut ad poenas comminandas infligendasve attinent aut personae iura coarctant aut iura aliis quaesita laedunt aut adversantur legi incommodum privatorum, strictae subsunt interpretationi; ceteri omnes, latae.”

<sup>100</sup> HUELS, “Privilege,” 246–248. “Laws and [singular] administrative acts that harm rights are subject to strict interpretation.”

must be interpreted according to the norm of canon 36 § 1; however, that interpretation must always be used by which those endowed with the privilege actually obtain some favour.”<sup>101</sup> Can the derogating clause be interpreted both strictly, *and* in such a way that the CDF actually obtains some favour? The answer to this question is affirmative; the strict interpretation offered above fulfils the requirements of both canon 36 § 1 and canon 77. Although there is no consensus in the literature on this point, the fact that numerous respected canonists argue for the stricter interpretation is a strong indication that an objective, positive, and probable doubt of law exists.<sup>102</sup>

One possible objection to the above argument concerns the true recipient of the favour. In the first place, arguing from the hermeneutic principles established in canons 36 and 77, McCormack posits the logical (albeit in his view, provisional and problematic) conclusion that a doubtful privilege granted to a public juridic person which concerns penal matters or harms acquired rights must be interpreted strictly.<sup>103</sup> He then raises the possible objection, supported by substantial quotations from Suárez, van Hove, and Michiels, that the former discipline and doctrine considered privileges granted to public juridic persons “to be equivalent to laws, since they were not given for the benefit of private persons.”<sup>104</sup> From this perspective, the 2002 privilege is not a favour granted

<sup>101</sup> CIC/1983, c. 77. “Privilegium interpretandum est ad normam can. 36 § 1; sed ea semper adhibenda est interpretatio, qua privilegio aucti aliquam revera gratiam consequantur.”

<sup>102</sup> The strongest arguments are found in Charles George RENATI, “Prescription and Derogation from Prescription in Sexual Abuse of Minor Cases,” in *J*, 67 (2007), 503–519. Among the authors who argue for the strict interpretation are GREEN, “Clerical Sexual Abuse,” 417; Ladislav M. ŌRSY, “Bishops’ Norms: Commentary and Evaluation,” in *Boston College Law Review*, 44 (2003), 1015–1016; Kenneth E. BOCCAFOLA, “The Special Penal Norms of the United States and Their Application,” in P.M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Montréal, Wilson & Lafleur, 2005, 270; P.J. BROWN, “Prescription and Statutes of Limitation,” 424–429; José Luis SÁNCHEZ-GIRÓN, “Algunos interrogantes en la disciplina codicial sobre la prescripción de la acción criminal,” in J. KOWAL and J. LLOBELL (eds.), *Iustitia et Iudicium, studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*, Libreria Editrice Vaticana, 2010, vol. 4, 2183–2184; Ariel David BUSO, “La prescripción extintiva y la dispensa de prescripción en el derecho penal canonico,” in *Anuario Argentino de Derecho Canonico*, 22 (2016), 144; AUSTIN, “Due Process,” 70–74; Valère NKOUAYA MBANDJI, *La prescription en droit canonique et dans la tradition du Code de Napoléon avec applications particulières aux délits les plus graves touchant aux mœurs*, Paris, Lethielleux, 183–187; Phillip J. BROWN, “Prescription and the Usefulness of Time,” in K. MARTENS (ed.), *A Service beyond All Recommendation: Studies Offered in Honor of Msgr. Thomas J. Green*, Washington, DC, Catholic University of America, 2019, 231. On the criteria necessary to establish a doubt of law, see John M. HUELS, “Commentary on Canon 14,” in *CLSA Comm2*, 67–69.

<sup>103</sup> MCCORMACK, *The Term Privilege*, 350–351.

<sup>104</sup> *Ibid.*, 350.



for the benefit of the individual judges of the CDF but a concession made by the legislator “*in favorem publicum*.”<sup>105</sup> For this reason, commentators on the former discipline argued that doubtful privileges granted *in favorem publicum* should be interpreted broadly, even if harmful to acquired rights, since such concessions were “for the sake of the common good of society or for the benefit of religion.”<sup>106</sup> There is much to recommend this point of view; nevertheless, as McCormack observes, “the problem is that it is precisely this type of concession which the [legislator] chose to remove from the classification of privilege”<sup>107</sup> in the *ius vigens*. In the *CIC/1983*, this kind of general provision for the community can only be effected by a new law which derogates in the strict and proper sense from an older law. Regardless, even if the 2002 rescript had been formally promulgated as a *lex specialis*, it would still be subject to strict interpretation.<sup>108</sup>

Precisely such a general provision for the benefit of the entire Catholic Church was effected by the 2010 revision of *SST/2001*,<sup>109</sup> which certainly derogated in the strict and proper sense from the former discipline. As such, we have to investigate whether or not *SST/2010* revoked or modified the 2002 privilege. Ordinarily, a privilege is revoked or modified by a singular *administrative* act.<sup>110</sup> It is also possible, however, to revoke or modify a privilege by a subsequent *legislative* act which *expressly* declares this fact.<sup>111</sup> As Huels has argued, the general revoking formula “anything to the contrary notwithstanding, even if worthy of special mention,”<sup>112</sup> is insufficient to revoke or modify a contrary privilege.<sup>113</sup>

<sup>105</sup> Ibid.

<sup>106</sup> Gommar MICHIELS, *Normae generales juris canonici: commentarius libri I Codicis juris canonici*, 2<sup>nd</sup> rev. ed., Paris, Tournai, Rome, Desclée, 1949, 2:431; quoted in MCCORMACK, *The Term Privilege*, 351, fn. 85. “Admittit vero legislator, iuxta doctrinam iam antea communiter receptam, quod *latam interpretationem recipiunt rescripta* quae, etsi iuri communiter vigenti derogent, *derogant tamen in favorem publicum*, seu ad ipsum bonum commune societatis vel religionis promovendum.”

<sup>107</sup> MCCORMACK, *The Term Privilege*, 351.

<sup>108</sup> See *CIC/1983*, cc. 14; 18; HUELS, “Privilege,” 246–248. “Laws and [singular] administrative acts that harm rights are subject to strict interpretation.”

<sup>109</sup> *SST/2010*.

<sup>110</sup> *CIC/1983*, c. 79; cf. cc. 47; 81.

<sup>111</sup> *CIC/1983*, c. 73. “Per legem contrariam nulla rescripta revocantur, nisi aliud in ipsa lege caveatur.” Cf. *CIC/1983*, c. 20. “Lex universalis minime derogat iuri particulari aut speciali, nisi aliud in iure expresse caveatur.” For further details, see MCCORMACK, *The Term Privilege*, 367–368.

<sup>112</sup> *SST/2010*, 419. “... contrariis quibuscumque, etiam speciali mentione dignis, non obstantibus.”

<sup>113</sup> John M. HUELS, “General Revoking Formulas in Canon Law and Their Juridical Effects,” in *StC*, 46 (2012), 127–129.

In fact, *SST/2010* neither revoked nor modified the 2002 privilege, but expressly *retained* it. “Without prejudice to the right [*ius*] of the CDF to derogate from prescription in individual cases, a criminal action for delicts reserved to the CDF is extinguished by prescription after twenty years.”<sup>114</sup> The syntax of the dependent clause of *SST/2010*, article 7 § 1 beginning “*Salvo iure*,” employing the ablative absolute, makes it clear that the new norm established in the independent clause does not modify the *pre-existing* right of the CDF—namely, that right (*ius*) which the CDF had been granted by the 2002 rescript. A more literal translation of the dependent clause is “the right of the Congregation being preserved” or “the right of the Congregation remaining unharmed;” either make it clear that, whatever right the CDF enjoyed before *SST/2010*, the CDF still possesses that same right. In other words, *SST/2010*, article 7 § 1 does not grant to the CDF any favour regarding prescription, other than the favour already granted by the 2002 rescript. The fact that *SST/2010*, article 7 § 1 omits two restrictive phrases (“*ai termini*” and “*su motivata domanda dei singoli Vescovi*”) contained in the 2002 rescript is of no juridic consequence. Had *SST/2010*, article 7 § 1 intended to establish a new disposition of law in this regard, it could have done so. Even if one should wish to argue that the dependent clause of *SST/2010*, article 7 § 1 is doubtful or intends to establish a new disposition of law, since the clause in question contains an exception to the law, it would also be subject to strict interpretation.<sup>115</sup>

## 4.2 — Current Praxis of the CDF

Although the jurisprudence and praxis of the Roman Curia is unable to resolve a doubt of penal law,<sup>116</sup> it may still be indicative of the *mens legislatoris* (c. 17). At a conference in 2011, the promoter of justice at the CDF argued that “The common good of the Church requires that the cases of delicts against the faith and of *delicta graviora* enjoy the widest possible prosecution, *salva veritate salvoque iure defensionis*. The right of the CDF to derogate from the twenty-year prescription (cf. *SST/2010*, art. 7 § 1) must

<sup>114</sup> *SST/2010*, art. 7 § 1. “Salvo iure Congregationis pro Doctrina Fidei a praescriptione derogandi pro singulis casibus, actio criminalis de delictis Congregationi pro Doctrina Fidei reservatis praescriptione exstinguitur spatio viginti annorum.” The phrase “*a praescriptione derogandi*” is an obvious solecism; moreover, “*exstinguitur*” is the orthography of the *CIC/1917* and *CCEO/1990*; the *CIC/1983* uses “*extinguitur*” (except for the typographical error in canon 1522).

<sup>115</sup> *CIC/1983*, c. 18. “Leges quae poenam statuunt aut liberum iurium exercitium coarctant aut exceptionem a lege continent, strictae subsunt interpretationi.”

<sup>116</sup> *CIC/1983*, c. 19; cf. c. 16 § 3.

be read in this light.”<sup>117</sup> This 2011 statement seems to indicate that the praxis of the CDF at that time was following the *broad* interpretation of the 2002 rescript.

On the other hand, the same 2011 address reaffirms the non-retroactive character of *SST/2010*. Specifically, Scicluna prefaced his address with a brief description of five “guiding principles” of the work of the tribunal of the CDF. The fourth principle, which concerns the competence of the CDF, needs to be quoted in full.

John Paul II, the author of [*SST/2001*], explained that [the] competence [of the CDF in *graviora delicta*] was a competence *ratione materiae*.<sup>118</sup> This means that the CDF is competent whenever a behaviour described by [*SST/2010*] is reported even in cases where there appears to be no delict and where the criminal action is extinguished. The classic example is the cleric who is accused [today] of sexual abuse of a 17-year-old person committed in 1993. In this case, the matter for competence is found in the sexual abuse of a person under 18 years committed by a cleric. But there is no delict because at the time (in 1993) canon 1395 § 2 was in force, which speaks of the delict of abuse of a minor under 16 (*salvo can. 1399*). In this case, the CDF is competent *ratione materiae* but not *ratione delicti*. Consequently, the dicastery cannot authorize a penal process but may suggest disciplinary measures for the protection of the common good. The cleric subject to these singular administrative measures will have the remedies of law.<sup>119</sup>

<sup>117</sup> Charles Jude SCICLUNA, “*Delicta graviora: ius processuale*,” in ASSOCIAZIONE CANONISTICA ITALIANA (ed.), *Questioni attuali di diritto penale canonico*, Studi giuridici, no. 96, Libreria Editrice Vaticana, 2012, 84. “Il bene comune della Chiesa richiede che i casi di delitti contro la fede e di delicta graviora godano della più ampia procedibilità, salva veritate salvoque iure defensionis. Il diritto della CDF di derogare dalla prescrizione ventennale (cf MP *SST* Art. 7 § 1) viene letto in questa ottica.” Monsignor Scicluna, currently the Archbishop of Malta and adjunct secretary at the CDF, was the promoter of justice at the CDF from 21 October 2002 to 6 October 2012. The conference at which this address was delivered took place from 5 to 8 September 2011. The text of this address published in 2012 was republished later in nearly identical form, with the addition of a seventh section regarding compensation for damages: IDEM, “*Delicta graviora: ius processuale*,” A. D’AURIA and C. PAPALE (eds.), *I delitti riservati alla Congregazione per la Dottrina della Fede*, Quaderni di Ius Missionale, no. 3, Vatican City, Urbaniana University Press, 2014, 109–128. Subsequent references are to the 2012 version, unless otherwise noted.

<sup>118</sup> JOHN PAUL II, allocution to the participants in the biannual plenary assembly of the CDF, 6 February 2004, no. 6, in AAS, 96 (2004), 399–402. “Nell’ultimo biennio la vostra Congregazione ha assistito ad un notevole incremento nel numero dei casi disciplinari riferiti ad essa per la competenza che il Dicastero ha *ratione materiae* sui delicta graviora, inclusi i delicta contra mores.”

<sup>119</sup> SCICLUNA, “*Delicta graviora*,” 80–81. “Il Beato Giovanni Paolo II, autore del MP *SST* nel 2001, spiegò che questa competenza era una competenza *ratione materiae*. Questo significa che la CDF è competente ogni qualvolta viene segnalato un comportamento descritto dal

In the first place, it must be said that the sexual abuse of a seventeen-year-old person committed by a cleric, “if indeed the delict was committed by force or with threats or publicly,” was and is most certainly a delict according to *CIC/1983*, canon 1395 § 2,<sup>120</sup> and remains so according to *CIC/2021*, canon 1395 § 3. Secondly, such abuse nearly always involves the additional delict of an “abuse of authority”<sup>121</sup> or “abuse of ecclesiastical power or office.”<sup>122</sup> Thirdly, such abuse most certainly constitutes the delict of “an external violation of the divine law.”<sup>123</sup> Fourthly, if the sexual abuse of a seventeen-year-old person did not constitute a delict under the *CIC/1983*, it makes no sense to speak of the extinction of a criminal action—which action can only arise from a delict. Fifthly, the hypothetical case obscures the

MP *SST* anche nei casi dove non sembra esserci delitto e dove l'azione criminale è estinta. L'esempio classico è del chierico che viene accusato di abuso sessuale di una persona di 17 anni commesso nel 1993. In questo caso la materia di competenza c'è in quanto ci si trova davanti all'abuso sessuale di una persona al di sotto dei 18 anni commesso da un chierico. Ma non c'è delitto perché all'epoca (nel 1993) vigeva il can. 1395 § 2 del *CIC* che parla del delitto di abuso di un minore sotto i 16 anni (salvo il *CIC* can. 1399). Nel caso in parola la CDF è competente *ratione materiae* ma non *ratione delicti*. Di conseguenza il Dicastero non può autorizzare un procedimento di natura penale ma può suggerire delle misure disciplinari per la tutela del bene comune. Il chierico oggetto di questi provvedimenti amministrativi singolari avrà i rimedi del diritto.”

<sup>120</sup> *CIC/1983*, c. 1395 § 2. “Clericus qui aliter contra sextum Decalogi praeceptum deliquerit, si quidem delictum vi vel minis vel publice vel cum minore infra aetatem sedecim annorum patratum sit, iustus poenis puniatur, non exclusa, si casus ferat, dimissione e statu clericali.” A delict which can be proven in the external forum is considered to be *public*; otherwise, it is *occult*; cf. *CIC/1983*, c. 1074. “Publicum censetur impedimentum, quod probari in foro externo potest; secus est occultum.” For further details, see Velasio DE PAOLIS, “Delitti contro il sesto comandamento,” in *Periodica de re canonica*, 82 (1993), 307–308; James H. PROVOST, “Offenses against the Sixth Commandment: Toward a Canonical Analysis of Canon 1395,” in *J*, 55 (1995), 656; John DIRAVIAM, *The Judicial Penal Procedure for the Dismissal of a Diocesan Priest from the Clerical State*, Thesis, Ottawa, Saint Paul University, 2008, 246–252; Velasio DE PAOLIS and Davide CITO, *Le sanzioni nella Chiesa: Commento al codice di diritto canonico Libro VI*, 2<sup>nd</sup> ed., Manuali, no. 8, Vatican City, Urbaniana University Press, 2008, 360–361. A return to the discipline of *CIC/1917*, c. 2359 seems advisable.

<sup>121</sup> *CIC/2021*, c. 1395 § 3. “Eadem poena de qua in § 2 puniatur clericus qui vi, minis vel abusu suae auctoritatis delictum committit contra sextum Decalogi praeceptum aut aliquem cogit ad actus sexuales exsequendos vel subeundos.”

<sup>122</sup> *CIC/1983*, c. 1389 § 1. “Ecclesiastica potestate vel munere abutens pro actus vel omissionis gravitate puniatur, non exclusa officii privatione, nisi in eum abusum iam poena sit lege vel praecepto constituta.”

<sup>123</sup> *CIC/1983*, c. 1399. “Praeter casus hac vel aliis legibus statutos, divinae vel canonicae legis externa violatio tunc tantum potest iusta quidem poena puniri, cum specialis violationis gravitas punitionem postulat, et necessitas urget scandala praeveniendi vel reparandi.” Scicluna adverted to this canon in his remarks quoted above.

reason why the CDF cannot “authorize” a penal process. Is this because no delict was committed, or because the action which arose from the delict has been extinguished by prescription? For all of these reasons, the case proposed by Scicluna obscures the very matter it purported to illuminate.

That having been said, the praxis of the CDF is in fact to “authorize” penal processes even when the criminal action has been extinguished. The following recently publicized case concerns the alleged sexual abuse of a minor (of unspecified sex or age) by a priest: “Notwithstanding the civil and canonical prescription of the events that took place twenty-eight years ago, the Congregation for the Doctrine of the Faith lifted [*levantó*] the canonical prescription, so that an administrative penal process could be carried out in the diocese to verify the veracity of the facts.”<sup>124</sup> While we may consider this decision indicative of the praxis of the CDF,<sup>125</sup> “an interpretation [of a doubtful law] in the form of a judicial sentence or of an administrative act in a particular matter ... does not have the force of law, and only binds the persons for whom and affects the matters for which it was given.”<sup>126</sup> That this remains the current praxis of the CDF is confirmed by the *Vademecum* published by the CDF on 16 July 2020.

For the delicts [reserved to the CDF], it should be noted that the terms of prescription for the criminal action have varied significantly over time. The terms currently in effect are defined by art. 7 (*SST/2010*). Yet, since art. 7 § 1 (of *SST/2010*) permits the CDF “to derogate from prescription” in individual cases, an ordinary or hierarch who has determined that the time for prescription has elapsed must still follow up on the *notitia de delicto* and carry out the eventual preliminary investigation, communicating the results

<sup>124</sup> DIOCESE OF ASTORGA, Communication of the Diocese of Astorga regarding Father D. José Manuel Ramos Gordón, 29 January 2017, no. 1, <http://www.diocesisastorga.es/actualidad/noticias/comunicado-del-obispado-de-astorga-255>. “No obstante la prescripción civil y canónica de los hechos ocurridos hace 28 años, la Congregación para la Doctrina de la fe levantó la prescripción canónica para que se pudiera realizar un proceso administrativo penal en la diócesis que verificara la veracidad de los hechos. Como conclusión del proceso se impuso al sacerdote la pena pertinente que aceptó con espíritu de humildad y arrepentimiento.” This press release is cited in Davide CITO, “Questioni sulla prescrizione dell’azione criminale,” in C. PAPAIE (ed.), *La procedura nei delitti riservati alla Congregazione per la Dottrina della Fede*, Quaderni di Ius Missionale, no. 12, Vatican City, Urbaniana University Press, 2018, 28, fn. 1 (= CITO, “Questioni sulla prescrizione dell’azione criminale,” in PAPAIE (ed.), *La procedura nei delitti riservati*).

<sup>125</sup> For a wealth of supporting evidence, complete with official correspondence of the CDF, see <https://www.archmil.org/clergy-abuse-response/restricted-priests.htm>.

<sup>126</sup> *CIC/1983*, c. 16 § 3, “Interpretatio autem per modum sententiae iudicialis aut actus administrativi in re peculiari, vim legis non habet et ligat tantum personas atque afficit res pro quibus data est.”

to the CDF, which alone is competent to decide whether prescription is to be retained or to grant a derogation from it. In forwarding the acts [to the CDF], it would be helpful for the ordinary or hierarch to express his personal opinion (*votum*) regarding an eventual derogation, motivating it based upon concrete circumstances (e.g., a cleric's health or age, his ability to exercise his right of self-defence, the harm caused by the alleged criminal act, the scandal given).<sup>127</sup>

According to Claudio Papale,<sup>128</sup> the praxis of the college internal to the CDF which examines recourses from decisions of the ordinary session<sup>129</sup> is to require that the decree authorizing an ordinary or hierarch to proceed *explicitly* mention that a “derogation” from prescription has been granted. Nevertheless, the CDF also maintains that the necessary “derogation” is granted *implicitly* when a mandate to proceed is given.<sup>130</sup> If an ordinary or hierarch should proceed without this mandate—and, therefore, without an

<sup>127</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*, 16 July 2020, no. 28, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20200716\\_vademecum-casi-abuso\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html) (2020). Vatican English translation, slightly modified. Cf. *ibid.*, no. 69.

<sup>128</sup> Claudio PAPALE, “Aspetti procedurali e prassi della Congregazione per la Dottrina della Fede,” in *Ius missionale*, 13 (2019), 210.

<sup>129</sup> For further details regarding this college, see SECRETARIAT OF STATE, rescript *ex Audientia* concerning the college of judges to be constituted within the CDF for considering recourses of clerics regarding *graviora delicta*, 3 November 2014, in AAS, 106 (2014), 885–886; IDEM, Regolamento dello speciale Collegio giudicante istituito per l'esame dei ricorsi alla Sessione Ordinaria della Congregazione per la Dottrina della Fede, Prot. No. 62.411, 12 May 2015 *ad triennium*, in *Periodica*, 105 (2016), 366–367; John Paul KIMES, “Il nuovo regolamento del Collegio per l'esame dei ricorsi in materia di delitti riservati” (paper presented at the VIII Corso intensivo sui delitti riservati alla congregazione per la dottrina della fede, Pontificia Università Urbaniana, 3 March 2020); IDEM, “Pronouncements of the College for the Examination of Recourses in Matters of *delicta reservata*,” in *Ius missionale*, 14 (2020), 157–176. The author thanks the Rev. Prof. Dr. Kimes for providing him with drafts of these papers, which had not yet been published as this article was going to press. Two months after Kimes's presentation, the CDF quietly uploaded a revised *regolamento* to its website. SECRETARIAT OF STATE, Regolamento dello speciale Collegio giudicante istituito per l'esame dei ricorsi alla Sessione Ordinaria della Congregazione per la Dottrina della Fede, 1 October 2018 *ad triennium*, [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20181001\\_regolamento-specialecollegiogiudicante\\_it.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20181001_regolamento-specialecollegiogiudicante_it.html). Although this document bears the date of 1 October 2018, Kimes's presentation indicates that the Secretary of State only offered “a final version of the revised *regolamento*” on 7 February 2019. Whatever the case may be, it would have been better for juridic certainty had the revised norms been promulgated by publication in the *Acta Apostolicae Sedis* or another official journal (cf. c. 8 § 1).

<sup>130</sup> Claudio PAPALE, *Delicta reservata: 130 casi giuridici*, Quaderni di Ius Missionale, no. 15, Città del Vaticano, Urbaniana University Press, 2021, 10.

express “derogation” from prescription (whether explicit or implicit)—could the acts later be sanated by the CDF in virtue of *SST/2010*, art. 18, as Papale maintains?<sup>131</sup> Since only violations of *procedural* laws can be sanated (art. 18), and since prescription clearly belongs to *substantive* law,<sup>132</sup> the acts of such cases would be null.<sup>133</sup> Were this not the case, then the institute of prescription would be essentially meaningless, as observance or non-observance could produce the same final result.

### 4.3 — Legality of the Broad Interpretation

As discussed above, the praxis of the CDF reveals a certain incoherence regarding retroactivity. On the one hand, the substantive norms of *SST/2001* and *SST/2010* are *not* retroactive, nor are they applied retroactively; on the other hand, the privilege “to derogate from prescription” referenced in a substantive norm (*SST/2010*, art. 7 § 1) *is* applied retroactively. As noted above, this praxis does not and cannot resolve the doubt regarding the broad or strict interpretation of the privilege.<sup>134</sup> It is certainly possible to suggest that the CDF’s current interpretation and praxis may need modification—as was the case, for example, regarding the CDF’s interpretation of *SST/2010*, article 27.<sup>135</sup>

The broad interpretation of the 2002 privilege, if it were classified *formally* as a singular *legislative* act, or if it had been promulgated as a new law in the context of *SST/2010*, would stand in clear violation of the code’s own discipline. “If a law [*lex*] is changed after a delict has been committed, the

<sup>131</sup> PAPALE, “Aspetti procedurali,” 213–215.

<sup>132</sup> For a presentation of the arguments of Michiels and Roberti as well as a recent decision of the Signatura regarding the decidedly *substantive* nature of prescription, see AUSTIN, “Prescription: Theory,” 348–351.

<sup>133</sup> Further juridic consequences of proceeding when the criminal action remains extinguished are considered below.

<sup>134</sup> *CIC/1983*, cc. 36 § 1; 77; cf. c. 16 § 3.

<sup>135</sup> See John Paul KIMES, “Impugning Decisions in Cases of *Delicta reservata*,” in PAPALE (ed.), *La procedura nei delitti riservati*, 115–120. Kimes, then an official of the disciplinary section of the CDF, describes in the cited pages how the CDF, “as a consequence to constructive criticism and further study,” modified its interpretation of and practice regarding *SST/2010*, art. 27. The volume edited by Papale appeared in March of 2018 and contains the text of five presentations given at the Urbaniana (27–28 March 2017). Kimes delivered an updated version of this presentation at the CLSA conference in Phoenix (8–11 October 2018). The text of this updated version appeared in September of 2019, as IDEM, “How Many Bites of the Apple? Impugning Decisions in Cases of *Delicta Reservata*,” in *CLSAP*, 80 (2018), 206–220.



law [*lex*] more favourable to the accused is to be applied.”<sup>136</sup> As such, the broad interpretation of the 2002 privilege does not conform to the principle *nullum crimen, nulla poena sine lege praevia*. However, since the 2002 privilege is classified *formally* as a singular *administrative* act (according to the new classification system of the *CIC/1983*), it is not subject to canon 1313 § 1, which concerns a change in law (*lex*). One might go further and assert that, even if the 2002 privilege *were* both formally and materially contrary to canon 1313 § 1, it is the juridic nature of a privilege to authorize actions which are (or would otherwise be) *contra legem*. This purely formal analysis is very neat, if rather nominalistic and ultimately insufficient, because it explicitly excludes the *material* consideration of how the 2002 privilege actually functions and what it actually authorizes. Such juridic formalism, with philosophical roots in nominalism or voluntarism, undermines the legitimacy of the entire penal system: if a juridic act functions materially as a law, it ought to be subject to the general norms governing laws—and *a fortiori* to the norms governing penal laws.

#### 4.4 — Summary

The above evaluation of the legality of the broad interpretation of the 2002 rescript may be summarized according to the following four horns of a two-fold dilemma.

1. Let us suppose the 2002 rescript to be a singular **administrative** act which did not change the law [*lex*].
  - a) If no law was changed, then canon 1313 § 1 does not apply. Therefore, the CDF can prosecute an extinguished criminal action.
  - b) But if no law was changed, then no acquired right was revoked (c. 4). Therefore, the CDF cannot prosecute an extinguished criminal action.
2. Let us suppose the 2002 rescript to be a singular **legislative** act promulgating a *lex specialis* for the CDF.
  - a) If a law was changed, then canon 1313 § 1 applies. Therefore, the CDF cannot prosecute an extinguished criminal action.
  - b) But if a law was changed, then acquired rights contrary to the 2002 rescript were *implicitly* revoked. Therefore, the CDF can prosecute an extinguished criminal action.

<sup>136</sup> *CIC/1983*, c. 1313 § 1. “Si post delictum commissum lex mutetur, applicanda est lex reo favorabilior.”



This analysis demonstrates that, according to the *ius vigens*, it is logically impossible to revoke a right acquired in virtue of a substantive penal law, since such revocation could only occur by the promulgation and retroactive application of a new substantive penal law unfavourable to the accused—which is explicitly forbidden by canon 1313 §1. This antinomy<sup>137</sup> is more than sufficient to establish an objective, positive, and probable doubt regarding the legality of the broad interpretation of the 2002 rescript. As such, canons 14 and 18 demand that the 2002 rescript be interpreted strictly.<sup>138</sup>

If, on the other hand, Gabba is correct that “the true limit of the retroactivity of laws consists solely in the respect for acquired rights,”<sup>139</sup> then the strict interpretation of the privilege authorizes only *apparent* rather than true retroactivity. That is, the right not to be accused is only acquired in the sense of canon 4 when the period of prescription has reached its *terminus ad quem*. To extend the length of a period of prescription which has not yet reached this *terminus* does not, therefore, harm anyone’s rights. As such, the strict interpretation does not violate the principle of penal legality.<sup>140</sup>

#### 4.5 — Note on Juridic Consequences

The preliminary investigation (cc. 1717–1720) ought to discover the juridic fact of the criminal action’s having been extinguished and communicate this to the ordinary. Following the strict interpretation, the ordinary ought to decide that a process to inflict or declare a penalty cannot be initiated and issue a decree to this effect (c. 1718 §1). If the ordinary should decide to proceed by way of extrajudicial decree, any such decree would suffer from the *textual nullity* (invalidity) expressly stated in the law.<sup>141</sup> If the ordinary

<sup>137</sup> The *OED* defines “antinomy” as: “1. A contradiction in a law, or between two equally binding laws.... 3. A contradiction between conclusions which seem equally logical, reasonable, or necessary; a paradox.”

<sup>138</sup> Cf. VI 5.12 RI 57. “Contra eum qui legem dicere potuit apertius est interpretatio facienda.” It is certainly ironic—to put the case no stronger—that diocesan bishops who are keen to prosecute priests and deacons long after the terms of prescription have expired strenuously object when they themselves are similarly cited in secular courts. See, e.g., <https://apnews.com/1f761912634d2f797ff2363fa7f1ea09>.

<sup>139</sup> Carlo Francesco GABBA, *Teoria della retroattività delle leggi*, 3<sup>rd</sup> ed., Turin, Unione, vol. 1, 122. “... il vero limite della retroattività delle leggi consistono unicamente nel rispetto dei diritti acquisiti.”

<sup>140</sup> Gabba, although acknowledging this fact, argued that in practice, the *lex favorabilior* still ought to be applied. *Ibid*.

<sup>141</sup> *CIC*/1983, c. 1720, 3°. “... si de delicto certo constet neque actio criminalis sit extincta, decretum ferat ad normam cann. 1342–1350, expositis, breviter saltem, rationibus in iure et

should decide to initiate a judicial penal process, any libellus of accusation would be *non-existent*, since an essential element (viz., the right to accuse, or criminal action) no longer exists, having been extinguished by prescription; accordingly, the libellus must be rejected, since the promoter of justice lacks legitimate standing in the trial.<sup>142</sup> If the judge should cite the accused, the citation would also be *non-existent*, since an essential element (viz., a legitimate libellus) did not exist;<sup>143</sup> accordingly, the acts of the process are both *textually null* (invalid)<sup>144</sup> as well as *non-existent*.<sup>145</sup> One could continue this analysis further, but the essential principles are that “When something is forbidden, everything is forbidden that follows from it;”<sup>146</sup> and “Things done *contra ius* must be considered as not having been done.”<sup>147</sup>

## 5 — Alternatives to the Penal Process

Let us now consider the case where a denunciation of a cleric concerning one of the reserved delicts is received by an ordinary or hierarch and is found to be credible, but it is discovered during the preliminary investigation that the criminal action has been extinguished. Let us also suppose that the CDF has declined to exercise the 2002 privilege retroactively in this particular case. What alternatives are available? In this case, although no penal sanction in the strict sense may legitimately be imposed due to the extinction of action, nevertheless “the ordinary is able to care for the person and for the public good by means of suitable warnings (*monitis*) and other means of pastoral solicitude, or even, if the matter warrants, through penal remedies.”<sup>148</sup> This section, therefore, will consider the remedies provided by the *CIC/2021* and the *CCEO/1990*.<sup>149</sup>

in facto.” Naturally, “Ignorance or error about invalidating or disqualifying laws does not impede their effect” (c. 15 § 1).

<sup>142</sup> *CIC/1983*, c. 1505 § 2. “Libellus reici potest tantum: ... 2° si sine dubio constet actori legitimam deesse personam standi in iudicio.”

<sup>143</sup> *CIC/1983*, c. 1507 § 1. “In decreto, quo actoris libellus admittitur, debet iudex ... citare ad litem contestandam.”

<sup>144</sup> *CIC/1983*, c. 1511. “Si citatio non fuerit legitime notificata, nulla sunt acta processus.”

<sup>145</sup> Cf. VI 5.12 RI 26. “Ea quae fiunt a iudice si ad eius non spectant officium non subsistunt.”

<sup>146</sup> VI 5.12 RI 39. “Cum quid prohibetur, prohibentur omnia quae sequuntur ex illo.”

<sup>147</sup> VI 5.12 RI 64. “Quae contra ius fiunt, debent utique pro infectis haberi.”

<sup>148</sup> *CIC/1983*, c. 1348. “Cum reus ab accusatione absolvitur vel nulla poena ei irrogatur, Ordinarius potest opportunis monitis aliisque pastoralis sollicitudinis viis, vel etiam, si res ferat, poenalibus remediis eius utilitati et publico bono consulere.” The code uses *monitum* and *monitio* interchangeably.

<sup>149</sup> Cf. CDF, *Vademecum*, nos. 78–83.

## 5.1 — *CIC/2021*

The diocesan bishop enjoys quite broad powers in the governing of his diocese. “The diocesan bishop in the diocese entrusted to him has all ordinary, proper, and immediate power which is required for the exercise of his pastoral function except for cases which the law or a decree of the Supreme Pontiff reserves to the supreme authority or to another ecclesiastical authority.”<sup>150</sup> The diocesan bishop has to power to issue a singular precept to urge the observance of the law (c. 49); to revoke the faculty to preach (c. 764) or to hear confessions (974); to remove (cc. 1740–1747) or transfer (cc. 1748–1752) from office. These are ordinary acts of the executive power of governance, and are not formally classified as sanctions. Therefore, none of these measures presupposes or requires a delict to have been committed.

In addition, the diocesan bishop has the power to impose administrative sanctions in specific circumstances. As noted above, canon 1312 distinguishes between sanctions which are penal in the strict sense (§§ 1–2) and other “administrative” sanctions (§ 3)<sup>151</sup>—namely, “Penal remedies and penances...; the former especially to guard against delicts, the latter rather to substitute for or increase a penalty.”<sup>152</sup> The distinction between penal and administrative sanctions is sometimes only nominal, however, since administrative sanctions can also be imposed by means of a judicial penal process—in which case they would be formally classified as *penal* sanctions.

In terms of penal remedies, the diocesan bishop can issue an official warning (*monitio*) in writing to one “who is in the near occasion of committing a delict, or to one upon whom, after investigation, grave suspicion of having committed a delict has fallen.”<sup>153</sup> Similarly, the diocesan bishop can

<sup>150</sup> *CIC/1983*, c. 381 § 1. “Episcopo dioecesano in dioecesi ipsi commissa omnis competit potestas ordinaria, propria et immediata, quae ad exercitium eius muneris pastoralis requiritur, exceptis causis quae iure aut Summi Pontificis decreto supremae aut alii auctoritati ecclesiasticae reserventur.”

<sup>151</sup> On this distinction, see Ángel MARZOA, Commentary on Canon 1312, in *Exegetical Comm*, IV/1:227.

<sup>152</sup> *CIC/1983*, c. 1312 § 3. “Praeterea remedia poenalia et paenitentiae adhibentur, illa quidem praesertim ad delicta praecavenda, hae potius ad poenam substituendam vel augendam.” For further details, see G. Paolo MONTINI, “I rimedi penali e le penitenze: un’alternativa alle pene,” in Z. SUCHECKI (ed.), *Il processo penale canonico*, Rome, Lateran University Press, 2003, 75–101.

<sup>153</sup> *CIC/1983*, c. 1339 § 1. “Eum, qui versatur in proxima delinquendi occasione, vel in quem, ex investigatione peracta, gravis cadit suspicio delicti commissi, Ordinarius per se vel per alium monere potest.” Cf. *CIC/1917*, c. 2307. “Eum qui versatur in proxima occasione delictum committendi vel in quem, ex inquisitione peracta, gravis suspicio cadit delicti commissi, Ordinarius per se vel per interpositam personam moneat.”

issue an official rebuke (*correptio*) to one “whose behaviour causes scandal or a grave disturbance of the public order.”<sup>154</sup> In the serious case proposed above, however, it is clear that these penal remedies are insufficient either to repair the scandal or restore the order of justice (c. 1341).

A penal precept, on the other hand, is made of rather sterner stuff. The revised canon 1339 restores the penal precept to its proper place and once again formally classifies it as a penal remedy.<sup>155</sup>

<i>CIC/1917, c. 2310</i>	<i>Schema/2011, c. 1339 § 4</i>	<i>CIC/2021, c. 1339 § 4</i>
Monitionibus et correptionibus incassum factis, vel si ex eisdem effectum sperare non liceat, datur praeceptum, quo quid agere quidve evitare praevenit debeat, accurate indicetur, cum poenae comminatione in casu transgressionis.	<b>Si, semel vel pluries pro prudentia</b> , monitiones vel correptiones <b>inutiliter alicui factae sint</b> , vel si ex iis effectum <b>expectari</b> non liceat, <b>Ordinarius det praeceptum poenale, in quo accurate praescribat quid agendum vel vitandum sit.</b>	Si, semel vel pluries, monitiones vel correptiones inutiliter alicui factae sint, vel si ex iis effectum <b>expectare</b> non liceat, Ordinarius det praeceptum poenale, in quo accurate praescribat quid agendum vel vitandum sit.

Although the revised paragraph is gratefully received, it must be pointed out that the formulation of the 2011 schema (adopted nearly verbatim in the revised version) omits the specific difference between a penal precept and a non-penal precept, namely, “the threat of a penalty in case of transgressing it” (*CIC/1917, c. 2310*). This specific difference is, of course, explicitly stated in canon 1319 § 1 and so was perhaps omitted from canon 1339 § 4 for the sake of economy.

That having been said, it remains the case that to issue a penal precept validly requires only executive power.<sup>156</sup> As Rik Torfs has pointed out,<sup>157</sup> when the penal precept is combined with the “special obligation [of] clerics ... to show

<sup>154</sup> *CIC/1983, c. 1339 § 2*. “Eum vero, ex cuius conversatione scandalum vel gravis ordinis perturbatio oriatur, etiam corripere potest, modo peculiaribus personae et facti condicionibus accommodato.” Cf. *CIC/1917, c. 2308*. “Si ex alicuius conversatione scandalum vel gravis ordinis perturbatio oriatur, est locus correptioni, ab Ordinario per se vel per interpositam personam, etiam per epistolam faciendae, peculiaribus accommodatae condicionibus personae et facti de quo agitur.”

<sup>155</sup> Cf. *CIC/1917*. “Caput I: De remediis poenalibus. Can. 2306. Remedia poenalia sunt: 1° Monitio; 2° Correptio; 3° Praeceptum; 4° Vigilantia.”

<sup>156</sup> *CIC/1983, c. 1319 § 1*. “Quatenus quis potest vi potestatis regiminis in foro externo praecepta imponere, eatenus potest etiam poenas determinatas, exceptis expiatoriis perpetuis, per praeceptum comminari.” On this point, see Eduardo LABANDEIRA and Jorge MIRAS, “El precepto penal en el *CIC* 83,” in *IE*, 3 (1993), 671–690.

<sup>157</sup> Rik TORFS, “La rétroactivité des peines canoniques,” in *RDC*, 56 (2006), 194–196 (= TORFS, “La rétroactivité”).

reverence and obedience to their own ordinary,”<sup>158</sup> it becomes a quite flexible and powerful instrument indeed. In fact, although this combination does not *formally* permit the retroactive application of a law unfavourable to the accused, the same *material* effect can be achieved.<sup>159</sup> This introduces once again the possibility of arbitrary punishment into the canonical system; as such, great prudence and discretion is required for the just application of this combination by the ordinary. It is for precisely this reason that the revised canon 1319 § 1 explicitly states that the penal precept is to be imposed “according to the pre-scripts of canons 48–58”—that is to say, according to the entire chapter of canons entitled “de decretis et praeceptis singularibus.”

<i>CIC/1983, c. 1319 § 1</i>	<i>Schema/2011, c. 1319 § 1</i>	<i>CIC/2021, c. 1319 § 1</i>
Quatenus quis potest vi potestatis regiminis in foro externo praecepta imponere, eatenus potest etiam poenas determinatas, exceptis expiatoriis perpetuis, per praeceptum comminari.	Quatenus quis potest vi potestatis regiminis in foro externo praecepta imponere <b>iuxta praescripta cann. 48-58</b> , eatenus potest etiam poenas determinatas, exceptis expiatoriis perpetuis, per praeceptum comminari.	Quatenus quis potest vi potestatis regiminis in foro externo praecepta imponere iuxta praescripta cann. 48-58, eatenus potest etiam poenas determinatas, exceptis expiatoriis perpetuis, per praeceptum comminari.

The ordinary who desires to impose a penal precept upon one of his subjects, therefore, “before issuing [the] singular decree ... is to hear those whose rights may be harmed” (c. 50); further, the decree is to be issued in writing and properly motivated (c. 51).

The revised canon 1339 also restores the penal remedy of vigilance.

<i>CIC/1917, c. 2311</i>	<i>Schema/2011, c. 1339 § 5</i>	<i>CIC/2021, c. 1339 § 5</i>
§1. Si casus gravitas ferat <i>et praecipue</i> si <i>agatur de eo qui in periculo versetur</i> relabendi in <i>idem crimen</i> , eum Ordinarius submittat vigilantiae. §2. <u>Vigilantia praecipi quodque potest ad augendam poenam</u> , <i>praecipue in recidivos</i> .	Si casus gravitas ferat, <b>ac praesertim si quis versetur in periculo relabendi in delictum</b> , eum Ordinarius, <b>etiam praeter poenas ad normam iuris irrogatas vel declaratas per sententiam vel decretum</b> , submittat vigilantiae <b>modo per decretum singulare determinato</b> .	Si casus gravitas ferat, ac praesertim si quis versetur in periculo relabendi in delictum, eum Ordinarius, etiam praeter poenas ad normam iuris irrogatas vel declaratas per sententiam vel decretum, submittat vigilantiae modo per decretum singulare determinato.

<sup>158</sup> *CIC/1983, c. 273*. “Clerici speciali obligatione tenentur Summo Pontifici et suo quisque Ordinario reverentiam et obedientiam exhibendi.”

<sup>159</sup> TORFS, “La rétroactivité,” 195. “La loi défavorable à l’accusé n’est pas appliquée rétroactivement, mais par le biais du précepte le même résultat pourra être obtenu.”

The 1917 code established that “If the gravity of the case demands it, and especially if it concerns one who is in danger of relapsing into the same crime [*crimen*], the ordinary is to subject him to *vigilantia*” (c. 2231 § 1). As is now known all too well, clerics who have committed delicts against the sixth commandment are often in precisely this danger, and in need of this kind of careful, watchful, pastoral oversight. In fact, this divine positive law obligation inheres in the office of *episcopus* itself, the very nature of which is to be an overseer (L. *episcopus* < Gr. *episkopein*, “to watch over”). Since the *ius vigens* legally obliges the diocesan bishop to exercise *vigilantia* in many other contexts,<sup>160</sup> it is most fitting that this positive law obligation has been resumed in the revised text. The new text substantially resumes the previous discipline, making it explicit that vigilance may be imposed even in addition to penalties imposed or declared by judicial sentence or administrative decree.

In addition to penal remedies, a diocesan bishop can also impose “a penance in the external forum; [namely], the performance of some work of religion, piety, or charity.”<sup>161</sup> So long as the delict is not entirely occult, the penance imposed may even be a public one.<sup>162</sup> It is easy to scoff at the idea of the imposition of “a life of prayer and penance” when this life is either completely hidden or lived inauthentically. Were this administrative sanction to involve some regular, public dimension, however, it would perhaps be more effective in repairing the scandal, restoring the order of justice, and even—it is not too much to be hoped—amending the offender (c. 1341).

The imposition of any of these administrative sanctions is subject to the norms governing singular administrative acts in general (cc. 35–47), singular decrees and/or precepts in particular (cc. 48–58), and administrative recourse (cc. 1732–1739).

<sup>160</sup> The diocesan bishop is legally bound to exercise vigilance with respect to: seminarians who live outside of the seminary (c. 235 § 2); the formation of all seminarians (c. 259 § 2); associations of the Christian faithful (cc. 305; 323; 325); the ecclesiastical discipline of the entire diocese (c. 392); the faith and ecclesiastical discipline of his suffragan dioceses, if a metropolitan (c. 436 § 1, 1°); certain monasteries *sui iuris* (c. 615); religious education in general (c. 804 § 1) and Catholic schools in particular (cc. 806; 810 § 2); the right use of the instruments of social communication (c. 823 § 1); the moderation of the sacred liturgy (c. 838); and, of course, temporal goods (*passim*).

<sup>161</sup> *CIC*/1983, c. 1340 § 1. “Paenitentia, quae imponi potest in foro externo, est aliquod religionis vel pietatis vel caritatis opus peragendum.”

<sup>162</sup> *CIC*/1983, c. 1340 § 2. “Ob transgressionem occultam numquam publica imponatur paenitentia.”

## 5.2 — CCEO/1990

As noted above, the *CIC*/1917 had a canon (c. 1704) to deal with the case in which the criminal action has already been extinguished, but an objective situation of injustice remains. The first remedy proposed by canon 1704 was the contentious action to repair damages (1°). The second remedy proposed by canon 1704 established that, even if the criminal action had been extinguished, “the ordinary is still able to utilize the remedies established in canon 2222 § 2.”<sup>163</sup> The first paragraph of canon 2222 was substantially resumed in *CIC*/1983 (c. 1399), as treated above. The second paragraph of canon 2222 stated:

In the same way, the same legitimate superior, even if it is only probable that a delict has been committed, or if the penal action for a certainly committed delict is prescribed, has not only the right [*ius*], but also the duty of not promoting a cleric whose suitability is not evident, and also, to avoid scandal, of prohibiting a cleric’s exercise of sacred ministry, or even removing him from office, according to the norm of law; which [remedies] in this case do not have the [formal] *ratio* of a penalty.<sup>164</sup>

We see here once again some indications of juridic nominalism, whereby the above is classified formally as an *administrative* sanction, although materially equivalent for most practical purposes to the *suspensio ex informata conscientia*—a former *penal* sanction (cc. 2186–2194).<sup>165</sup>

This former disposition of the Latin code was resumed in the code for the Eastern Churches. “Although a penal action has been extinguished by prescription: 1° a contentious action to repair damages which may have arisen from a delict is not, by that very fact, extinguished; 2° if the public good so requires, a hierarch is able to utilize suitable administrative remedies, including suspension from the exercise of sacred ministry or removal from

<sup>163</sup> *CIC*/1917, c. 1704, 2°. “Ordinarius remediis can. 2222, § 2 statutis uti adhuc potest.”

<sup>164</sup> *CIC*/1917, c. 2222 § 2. “Pariter idem legitimus Superior, licet probabile tantum sit delictum fuisse commissum aut delicti certe commissi poenalis actio praescripta sit, non solum ius, sed etiam officium habet non promovendi clericum de cuius idoneitate non constat, et, ad scandalum evitandum, prohibendi clerico exercitium sacri ministerii aut etiam eundem ab officio, ad normam iuris, amovendi; quae in casu non habent rationem poenae.”

<sup>165</sup> Concerning the *suspensio* of the former discipline, see SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, instruction concerning suspensions *ex informata conscientia*, *Omni tempore sollicita*, 20 October 1884, in F. DROSTE (ed.), *Canonical Procedure in Disciplinary and Criminal Cases of Clerics: A Systematic Commentary on the 1880 Instruction of the S.C. Epp. et Reg.*, New York, Benziger Bros., 1887, 231–234; Edwin MURPHY, *Suspension ex informata conscientia*, *Canon Law Studies*, no. 76, Washington, DC, Catholic University of America, 1932.

office.”<sup>166</sup> Again, such a flexible administrative instrument is easily abused, requiring great prudence and discretion in its application to specific cases.

### 5.3 — Summary

When both criminal and contentious actions arising from a possible delict have been extinguished, it is understandable that a victim may feel that the ecclesiastical institute of prescription exists only to protect the guilty or the assets and reputation of the institution. This feeling needs to be tempered by reason. First, reason would point out how easy it is to harm irreparably the good reputation of a cleric by means of a single *allegation* of misconduct—an allegation which can be either true or false. Secondly, when penal sanctions are no longer available, if a hierarchical superior of the Latin Church should arrive at moral certainty regarding the misconduct of a cleric subject to him, he may impose any or all of the following administrative measures: singular precept; revocation of the faculty to preach and/or hear confessions; removal from office; warning (*monitio*); rebuke (*correptio*); penal precept (e.g., commanding or forbidding residence in a particular place); vigilance (*vigilantia*); public penance. If a priest were to become legitimately subject to all of these administrative measures, he could effectively be perpetually barred from any public exercise of the power of order and all acts of the power of governance. Such an *administrative* sanction is materially identical to the censure of qualified suspension—a most serious penalty indeed.<sup>167</sup> (In the Eastern Churches, such an administrative sanction can be materially identical to the censure of *unqualified* suspension.<sup>168</sup>) The assurance of the former discipline that such sanctions “do not have the nature [*ratio*] of a penalty”<sup>169</sup> is rather droll. Indeed, it is one of the ironies—not to say contradictions—of Book VI of the Latin code that “perpetual penalties cannot be imposed or declared by decree” (c. 1342 §2), but perpetual administrative sanctions materially equivalent to penalties can be. It would be utterly false, therefore, to claim that, once the terms of prescription have run, “nothing can be done.” On the contrary, it would appear that, in some cases, altogether too much can be done.

<sup>166</sup> *CCEO*/1990, c. 1154. “Actione poenali praescriptione extincta: 1° non est hoc ipso extincta actio contentiosa forte ex delicto orta ad damna reparanda; 2° si bonum publicum requirit, Hierarcha remediis opportunis administrativis non exclusa suspensione ab exercitio ministerii sacri vel amotione ab officio uti potest.”

<sup>167</sup> *CIC*/2021, c. 1333 §1. “Suspension prohibits: 1° all or some acts of the power of orders; 2° all or some acts of the power of governance; 3° the exercise of all or some of the rights or functions attached to an office.”

<sup>168</sup> *CCEO*/1990, c. 1154, 2°.

<sup>169</sup> *CIC*/1917, c. 2222 §2. “... quae in casu non habent rationem poenae.”



## *Conclusion*

While we continue to await the new apostolic constitution on the Roman curia, a number of conclusions arise from this study. In the first place, it should be clear that both the theoretical foundations and practical application of the canonical institute of prescription merit further study, particularly regarding the 2002 privilege of the CDF.<sup>170</sup> Secondly, it would be a great practical help to diocesan tribunals and advocates if the jurisprudence of the CDF were to be published.<sup>171</sup> Finally, if reserved delicts alleged to have occurred thirty or forty years ago are allowed to be prosecuted, the competence of the Apostolic Signatura to review such decisions ought to be restored, given the uncertainty regarding the legitimacy of the broad interpretation of the 2002 privilege, the grave difficulties posed to the practical exercise of the right of defense, and the fact that perpetual expiatory penalties can be imposed by means of an extrajudicial decree.<sup>172</sup>

<sup>170</sup> As this article was going to press, a new study was published: Rafael Manfred RIEGER, *Verjährung im kanonischen Recht: Studien zum Telos eines Rechtsinstituts*, Münchener Theologische Studien. Kanonistische Abteilung, no. 79, Sankt Ottilien, Eos Verlag, 2021.

<sup>171</sup> The appearance of Papale's most recent study is an encouraging sign. Claudio PAPALE, *Delicta reservata: 130 casi giuridici*, Quaderni di Ius Missionale, no. 15, Vatican City, Urbaniana University Press, 2021.

<sup>172</sup> On this final point, see Ruud G. W. HUYSMANS, "The Inquisition for Which the Pope Did Not Ask for Forgiveness," in *J*, 66 (2006), 469–482; William RICHARDSON, "An Appalling Vista? The Future of Judicial Penal Trials in the Latin Code," in *StC*, 46 (2012), 341–354; Joaquín LLOBELL, "Il giusto processo penale nella Chiesa e gli interventi (recenti) della Santa Sede," in *Archivio Giuridico*, 232 (2012), 165–224; 293–357; IDEM, "Giusto processo e 'amministrativizzazione' della procedura penale canonica," 1–62.

## THE LENGTHENING DURATION OF INITIAL FORMATION IN RELIGIOUS INSTITUTES: HISTORICAL-CANONICAL OVERVIEW

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**SUMMARY** — Many of the elements of religious life addressed in the 1983 Code of Canon Law can be traced to practices of the earliest Christian monastics, especially cenobitic monastics. Among these elements is the requirement of a period of probation—now called “initial formation”—before new members are permanently admitted into a religious institute. This study presents a historical-canonical overview of the stages and duration of formation in religious institutes, beginning with Pachomius in the fourth century and concluding with Pope Francis’ 2016 apostolic constitution *Vultum Dei quaerere* and its implementing instruction *Cor orans*.

**RÉSUMÉ** — De nombreux éléments de la vie religieuse abordés dans le Code de droit canonique de 1983 remontent aux pratiques des premiers monastiques chrétiens, en particulier les monastiques cénobitiques. Parmi ces éléments figure l’exigence d’une période de probation – appelée aujourd’hui «formation initiale» – avant que les nouveaux membres ne soient définitivement admis dans un institut religieux. Cette étude présente un aperçu historico-canonique des étapes et de la durée de la formation dans les instituts religieux, en commençant par Pachomius au quatrième siècle et en terminant par la constitution apostolique *Vultum Dei quaerere* du pape François en 2016 et son instruction d’application *Cor orans*.

### *Introduction*

When Pachomius set out to become an anchorite in the Egyptian desert in the early fourth century, he knocked on the door of the cell of Apa Palamon, who was known as “a holy old man,” and asked him for guidance.<sup>1</sup>

<sup>1</sup> Armand VEILLEUX (ed. and trans.), *Pachomian Koinonia*, Volume I: *The Life of Saint Pachomius* 10, Kalamazoo, MI, Cistercian Publications, 1980, 29-30.

Apa Palamon explained the difficulties of the monastic life and told Pachomius to go away and reconsider. Pachomius insisted, until the old man admitted him into his cell. Apa Palamon tested Pachomius for three months, convinced of the young man's determination, and then clothed him in a monk's habit.<sup>2</sup>

When Pachomius established the cenobitic form of monasticism, he left each newcomer outside the door of the monastery for a few days, scrutinizing and teaching him before admitting him into the community. St. Benedict prescribed in his sixth-century rule that a newcomer to the monastic life should be left knocking at the door for four or five days, then spend one year as a novice, before being admitted permanently. For most of the subsequent centuries of religious life, admission followed the plan of Benedict: a few days or months of preliminary probation, followed by a one-year novitiate, then immediately by perpetual profession. However, the more recent trend is to lengthen "initial formation." The 1983 Code of Canon Law requires candidates for religious life to complete at least one year as a novice and at least three years in temporary profession before being admitted validly to perpetual profession. More recently, in his 2016 apostolic constitution *Vultum Dei quaerere*, Pope Francis decreed that a woman must be in initial formation for a minimum of nine years and a maximum of twelve before making perpetual profession in a monastery of contemplative nuns.<sup>3</sup>

This study presents an overview of the lengthening period of initial formation in religious institutes, as required by universal and/or proper law. The first section will present the procedures for admitting candidates from the beginnings of cenobitic monasticism to the Council of Trent. The second section will begin with Trent and continue to the 1917 Code of Canon Law. The third section will examine the applicable canons in the 1917 code. The fourth section will look at preconconciliar, conciliar, and postconciliar developments; and the fifth section will examine the canons on formation of religious in the 1983 code. The final section will present the norms for nuns in *Vultum Dei quaerere* and its implementing instruction, *Cor orans*. The study begins in the East, where cenobitic monasticism first appeared, but it will thereafter focus on the West. Church law regarding religious life in the Eastern Catholic Churches will not be included, nor does the study address incorporation into secular institutes and societies of apostolic life.

<sup>2</sup> Ibid., 32.

<sup>3</sup> FRANCIS, apostolic constitution *Vultum Dei quaerere* 29, 29 June, 2016, Vatican City, Libreria Editrice Vaticana, 2016 (= *VDq*).

## 1 — *From Pachomius to the Council of Trent*

Pachomius (ca. 292-348) is generally regarded as the founder of cenobitic monasticism, the first form of what came to be known in the Church as religious life. Considered together, the *Bohairic Life of Pachomius* and the *Rules of Pachomius* provide a description of how Pachomius incorporated newcomers into the monasteries of his Koinonia.<sup>4</sup> The *Praecepta*, one of four parts of the *Rules of Pachomius*, prescribed the following:

When someone comes to the door of the monastery, wishing to renounce the world and be added to the number of the brothers, he shall not be free to enter. First, the father of the monastery shall be informed of his coming. He shall remain outside at the door a few days and be taught the Lord's prayer and as many psalms as he can learn. Carefully shall he make himself known: has he done something wrong and, troubled by fear, suddenly run away? Or is he under someone's authority? Can he renounce his parents and spurn his own possessions? If they see that he is ready for everything, then he shall be taught the rest of the monastic discipline: what he must do and whom he must serve, whether in the *synaxis* of all the brothers or in the house to which he is assigned, as well as in the refectory. Perfectly instructed in every good work, let him be joined to the brothers. Then they shall strip him of his secular clothes and garb him in the monastic habit.<sup>5</sup>

Apa Pachomius stationed brothers "whose speech was seasoned with salt" at the doorway of the monastery to greet visitors and carry out the initial instruction of anyone who sought to become a monk.<sup>6</sup> After remaining a few days at the door, the one drawn to monastic life was assigned to a house in the monastery and joined the brothers for prayer, work, and meals for what seems to be a further period of probation, before exchanging his secular clothing for that of the monastery, that is, before being received permanently.<sup>7</sup> While the length of this further probation is not specified, the Pachomian literature established the elements of incorporation that were

<sup>4</sup> There are various recensions of the *Life of Pachomius*, one of them being the *Bohairic Life* (= *SBo*). The *Rules of Pachomius* are in four parts: *Praecepta* (= *Pr.*), *Praecepta et Instituta* (= *Inst*), *Praecepta atque Judicia* (= *Jud.*), and *Praecepta ac Leges* (= *Leg.*). The *Bohairic Life*, *Rules*, and other Pachomian literature are in English translation in the three-volume series, Armand VELLEUX (ed. and trans.), *Pachomian Koinonia*, beginning with volume 1 in 1980 (note 1 above). The *Bohairic Life* is in vol. 1 and the *Rules* are in vol. 3. "Koinonia," which means partnership, fellowship, communion, or community, was the name given to the Pachomian monasteries collectively.

<sup>5</sup> PACHOMIUS, *Praecepta* 49, in *ibid.*, Volume Two: *Pachomian Chronicles and Rules*, 1981, 152-153.

<sup>6</sup> *SBo* 26, *ibid.*, vol. 1, 48-49.

<sup>7</sup> *Pr.* 49, *ibid.*, vol. 2, 152-153.

reflected in subsequent monastic rules: 1) scrutiny of the newcomer's freedom and motives; 2) education of the newcomer in the basics of the Catholic faith and the ways of the monastery; 3) solicitation of the newcomer's willingness to renounce the world, family, and personal possessions; and 4) an experience of the day-to-day life of the monastery.

Another federation of monasteries was founded in Upper Egypt around 360 by a former Pachomian monk named Pcol.<sup>8</sup> The third leader of this federation, Shenoute (347-465), compiled monastic rules, some of which probably derived from Pcol, who probably derived them from his Pachomian experience.<sup>9</sup> At the time of Shenoute, the federation consisted of three monasteries, two for men (the White Monastery and the Red Monastery) and one for women.<sup>10</sup> As with Pachomius, admission began at the gatehouse. When a newcomer requested to become a monastic, the gatekeeper summoned the father of the congregation, who interviewed and scrutinized him.<sup>11</sup> The newcomer was informed of the monastic way of life<sup>12</sup> and told to renounce ownership of everything he possessed.<sup>13</sup> He was informed that he would be required to make the renunciation in a legal form within one to three months of being received.<sup>14</sup> Then, the father led him into the church where, before the altar, the newcomer made a solemn oath or covenant (*diathēkē*) to comply with the way that the members lived and to obey all commands.<sup>15</sup> Following that, he was assigned to one of the two men's monasteries. At some point, he was stripped of his civilian clothing and received the monk's garb. He still had to learn the daily life of the monks in a "trial period" of up to three months before his renunciation of property took legal effect. "The institutional judgment in Shenoute's federation seems to have been that within the three-month trial period, a new monk should be able to attain a satisfactory and routine sense of his new reality of everyday life—he should be able to take it for granted as *his* world, as *the* world."<sup>16</sup> The admission

<sup>8</sup> Bentley LAYTON, *The Canons of Our Fathers: Monastic Rules of Shenoute*, Oxford, University Press, 2014, 3 (= LAYTON).

<sup>9</sup> The rules of Shenoute are contained within a larger collection of his writings called *Canons*. See *ibid.*, 35.

<sup>10</sup> *Ibid.*, 11-12.

<sup>11</sup> SHENOUE, *Canons* Book 9, n. 410; LAYTON, 265. See also LAYTON, 78-80, for a description of the admission procedures.

<sup>12</sup> SHENOUE, *Canons* Book 9, n. 440; LAYTON, 279.

<sup>13</sup> LAYTON, 78.

<sup>14</sup> SHENOUE, *Canons* Book 5, n. 243; LAYTON, 191.

<sup>15</sup> SHENOUE, *Canons*, Book 9, n. 464, LAYTON, 293.

<sup>16</sup> LAYTON, 80.

procedure was similar for women who wished to become monastics in the federation.

St. Basil of Caesarea (330-379) composed two rules for “the devout life”: *Regulae Fusius Tractatae* (= *Reg. fus.*) or *Great Asceticon* or *Long Rules*, and *Regulae Brevius Tractatae* (= *Reg. brev.*) or *Small Asceticon* or *Short Rules*. Like Shenoute, he wrote for both female and male monastics. While Basil considered it “hazardous” to reject anyone who sought to join the monastic life, he also called for “exhaustive scrutiny” of those who presented themselves.<sup>17</sup> The newcomer was queried about his/her past life and tested by humiliations before being enrolled “among those who have consecrated themselves to the Lord.”<sup>18</sup> Basil declared that there was no minimum age for applicants, but no one could make the required vow of chastity, by which they formally became perpetual members, until they were mature enough to choose it on their own.<sup>19</sup> The duration of time in probation depended on the age, maturity, and spiritual progress of the individual candidate; Basil did not prescribe a specific period.

Cassian (ca. 360-430), in his *Institutes*, written after he moved to Marseilles where he established two monasteries, prescribed that anyone who sought to be received into monastic life was not to be admitted until he had lain outside the gate for ten or more days, where he was subjected to insults and reproaches, thus demonstrating his perseverance, humility, and patience.<sup>20</sup> Next, the candidate was brought to the council of the brothers, stripped of what was his and clothed in the garb of the monastery at the hands of the abba.<sup>21</sup> He was not yet counted among the brothers but was assigned for one year to assist the elder who lived outside the entrance and looked after guests. Then, he was brought into the monastery where another elder provided further guidance for ten younger monks. Cassian does not prescribe a length of time for this final phase of admission, except to note that a new member’s personal clothing was kept in storage until it was clear that he would persevere, after which it was given to the poor.<sup>22</sup> If evidence of perseverance was the indicator for perpetual membership, the length of time undoubtedly varied from person to person.

<sup>17</sup> BASIL OF CAESAREA, *Regulae Fusius Tractatae* 10, in Monica Wagner (trans.), *St. Basil: The Long Rules—I*, Boston, Daughters of St. Paul, 1950, 45.

<sup>18</sup> *Reg. fus.* 10; *ibid.*, 46-47.

<sup>19</sup> *Reg. fus.* 15; *ibid.*, 50-54.

<sup>20</sup> John CASSIAN, *Institutes* 4.3, in Boniface RAMSEY (ed. and trans.), *John Cassian: The Institutes*, New York/Mahwah, NJ, The Newman Press, 2000, 79.

<sup>21</sup> *Inst.* 4.5; *ibid.*, 80.

<sup>22</sup> *Inst.* 4.6; *ibid.*, 81.

Augustine of Hippo (354-430), who wrote the oldest known monastic rule in the West, did not address the process of admission. Caesarius of Arles (ca. 468-542), who compiled the first known rule written exclusively for women, prescribed that anyone who wished to take up the religious life would come first to the parlor, where the rule was read to her.<sup>23</sup> If she declared resolutely and freely that she would observe the rule, she was invited into the monastery.<sup>24</sup> For one year, she was entrusted to an elder sister, who assessed her character and compunction and trained her “either rapidly or slowly.”<sup>25</sup> The newcomer continued wearing her own clothing for this year after which, if deemed suitable, she assumed religious garb.

There are numerous extant rules from these early centuries of monasticism, but the Rule of Benedict dominated in the West throughout the Middle Ages. Benedict (ca. 480-540) prescribed admission procedures for four categories of candidates: children who were offered to the monastery by their parents,<sup>26</sup> priests,<sup>27</sup> monks transferring from other monasteries,<sup>28</sup> and adult laymen who came on their own initiative.<sup>29</sup> The procedures for admitting adult laymen, probably the most typical group of candidates, are relevant to this study. Like many of his predecessors, Benedict left a newcomer knocking at the door for four or five days where he was subjected to “harsh treatment and difficulty of entry.”<sup>30</sup> If he persevered, he was allowed to stay in the guest quarters for a few days. Then, he was admitted to the novitiate (*cella noviciorum*), a separate space in the monastery, where *noviter* resided for one year under the care of a “senior chosen for his skill in winning souls.”<sup>31</sup> Three times during the novitiate, the rule was read to the novice in its entirety.<sup>32</sup> If, after the third reading at the end of the twelve months, he promised to observe the rule and obey every command given to him, he was received permanently into the community. The ritual of reception occurred in the oratory, where the novice read and signed a document written in his

<sup>23</sup> CAESARIUS OF ARLES, *Regula ad Virgines* 58, in Maria Caritas MCCARTHY (ed. and trans.), *The Rule for Nuns of St. Caesarius of Arles: A Translation with a Critical Introduction*, Cleveland, OH, John T. Zupal, Inc., 1985, 189 (= MCCARTHY).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 4, MCCARTHY, 171.

<sup>26</sup> BENEDICT OF NURSIA, *The Rule of St. Benedict* 59, in Timothy FRY et al. (eds.), *RB1980: The Rule of St. Benedict in Latin and English with Notes*, Collegeville, MN, The Liturgical Press, 1981, 270-273 (= *RB*, FRY et al.).

<sup>27</sup> *RB* 60; FRY et al., 272-275.

<sup>28</sup> *RB* 61; FRY et al., 274-277.

<sup>29</sup> *RB* 58; FRY et al., 266-271.

<sup>30</sup> *RB* 58; Latin in FRY et al., 266, English in FRY et al., 267.

<sup>31</sup> *Ibid.*

<sup>32</sup> *RB* 58; Latin in FRY et al., 266 and 268, English in FRY et al., 267 and 269.

own hand, in which he promised stability, fidelity to the monastic way of life, and obedience:<sup>33</sup> “Then the novice prostrates himself at the feet of each monk to ask his prayers, and from that very day he is to be counted as one of the community.”<sup>34</sup> Following this, the new monk renounced his possessions and exchanged his own clothing for what belonged to the monastery.<sup>35</sup>

Benedict is credited with initiating the practice of a one-year novitiate and providing a separate place for the novices to live.<sup>36</sup> His procedure for admission of a new member—a one-year novitiate followed immediately by perpetual profession—became the practice of nearly all subsequent forms of religious life up to the nineteenth century. For example, *The Later Rule of Francis of Assisi*, approved in 1223, required a one-year novitiate followed by perpetual profession, after which it was “absolutely forbidden” to leave the Order.<sup>37</sup> Clare of Assisi required the abbess to receive the consent of the majority of the sisters and the permission of the Lord Cardinal Protector before admitting a newcomer to the one-year period of probation.<sup>38</sup> On the other hand, the Primitive Constitutions of the Order of Preachers required only a six-month probation, which could be dispensed if a candidate was mature enough to be admitted to profession immediately.<sup>39</sup> No one under eighteen years of age was to be received.<sup>40</sup>

Ignatius of Loyola (1491-1556), the founder of the Society of Jesus, prolonged the period of probation beyond the usual one-year novitiate. He was determined that candidates be “long tested” and “well-known” before being accepted into the Society.<sup>41</sup> He established four categories of members: 1) spiritual coadjutors, who were priests assigned to ministerial works; 2) temporal coadjutors, who were lay brothers assigned to household and manual work; 3) scholastics, who were studying for ordination; and 4) the

<sup>33</sup> RB 58; Latin in FRY et al., 268, English in FRY et al., 269.

<sup>34</sup> Ibid.

<sup>35</sup> RB 58; Latin in FRY et al., 268 and 270, English in FRY et al., 269 and 271.

<sup>36</sup> Terrence KARDONG, *Benedict's Rule: A Translation and Commentary*, Collegeville, MN, The Liturgical Press, 1996, 482.

<sup>37</sup> FRANCIS OF ASSISI, “The Rule of 1223” 2, in Marion A. HABIG (ed.), *Saint Francis of Assisi: Omnibus of Sources*, vol. 1, Quincy, IL, Franciscan Press, 1972.

<sup>38</sup> CLARE OF ASSISI, *The Rule of St. Clare* 2, in Mother Mary Frances (trans.), *Rule and Testament of St. Clare, Constitutions for Poor Clare Nuns*, Chicago, IL, Franciscan Herald Press, 1987.

<sup>39</sup> *The Primitive Constitutions of the Order of Friars Preachers* XIV, [www.domcentral.org/trad/domdocs/0011.htm](http://www.domcentral.org/trad/domdocs/0011.htm) (= *Primitive Const.*).

<sup>40</sup> Ibid., XIII.

<sup>41</sup> IGNATIUS OF LOYOLA, *The Constitutions of the Society of Jesus* 190, in George GANSS (ed. and trans.), *Saint Ignatius of Loyola: The Constitutions of the Society of Jesus*, St. Louis, The Institute of Jesuit Sources, 1970, 136-137.



professed.<sup>42</sup> Each applicant was required to remain as a guest in a “house of first probation” for twelve to twenty days, or longer if the superior considered it necessary.<sup>43</sup> During this period, the applicant examined the Society and the Society examined the applicant.<sup>44</sup> Following this first probation, a suitable candidate was admitted to a further two-year probation, or novitiate.<sup>45</sup> After completing the novitiate, those who were admitted to be coadjutors made simple but perpetual vows.<sup>46</sup> Scholastics who completed the novitiate made simple perpetual vows, along with a promise to become a spiritual coadjutor or a professed member after completing their studies and one more year of probation.<sup>47</sup> The professed were priests who made solemn vows of poverty, chastity, and obedience, plus a fourth solemn vow of special obedience to the Roman Pontiff.<sup>48</sup>

## *2 — From the Council of Trent to the 1917 Code of Canon Law*

From the time of Pachomius to the sixteenth century, the manner and duration of a probation before perpetual profession were requirements of the proper law of religious institutes. While most adopted Benedict’s practice of a one-year novitiate followed immediately by profession, some prescribed different periods of candidacy. There was no church law that required a novitiate of a particular duration for validity. That began to change gradually in the thirteenth century. In a 1244 letter, Pope Innocent IV “ordered the Friars Preachers to pass a year in the novitiate under penalty of the invalidity of their subsequent profession.”<sup>49</sup> A letter, attributed in the *Liber Sextus* to Pope Alexander IV, extended this to the Friars Minor. “The letter ordered that, if anyone should have the temerity to disregard this prohibition of a curtailed novitiate, the candidate so received was not a member of the said

<sup>42</sup> On the classes or grades of members, see IGNATIUS OF LOYOLA, *General Examen and Its Declarations* 12-14, in *ibid.*, 82-83. See also footnote 20 in *ibid.*, 81-82.

<sup>43</sup> IGNATIUS OF LOYOLA, *Const.* 190, in *ibid.*, 136.

<sup>44</sup> See IGNATIUS OF LOYOLA, *Const.* 190-203 for the kind of scrutiny that occurred during this first probation; in *ibid.*, 135-139.

<sup>45</sup> IGNATIUS OF LOYOLA, *General Examen* 16; *ibid.*, 83-84.

<sup>46</sup> IGNATIUS OF LOYOLA, *General Examen* 13; *ibid.*, 82-83.

<sup>47</sup> IGNATIUS OF LOYOLA, *General Examen* 14 and 16; *ibid.*, 83-84.

<sup>48</sup> IGNATIUS OF LOYOLA, *General Examen* 12; *ibid.*, 82.

<sup>49</sup> Ralph F. BALZER, *Computation of Time in a Canonical Novitiate: A Historical Conspectus and Commentary*, Canon Law Studies 212, Washington, DC, The Catholic University of America, 1945, 19.

order, and the superior who received him was *ipso facto* suspended from receiving any other aspirants.”<sup>50</sup>

The requirement of a one-year novitiate for the validity of profession became universal law at the sixteenth-century Council of Trent which decreed that no religious institute, whether of men or women, could admit anyone to profession who had not completed the sixteenth year of age and who had been in probation for less than one year after reception of the habit.<sup>51</sup> “Any profession made sooner is null and imposes no obligation to the observance of any rule either of a religious body or an order, neither does it entail any other effects whatsoever.”<sup>52</sup>

Following Trent, canonists concerned themselves with how to compute the required one-year novitiate, lest profession be invalidated. They also debated whether interruptions in the year nullified the novitiate. Such matters would ultimately be addressed in the 1917 Code of Canon Law. In the meantime, two new stages of candidacy found their way into church law in the centuries leading up to the code. The first was a lengthened pre-novitiate period of probation (postulancy) and the second was a period of temporary vows preceding perpetual profession.

The postulancy was a natural progression from the ancient monastic practice of leaving newcomers outside the monastery, then receiving them into the guest quarters for a few days before admitting them to the novitiate. The French Benedictine Congregation of St. Maur, which existed from 1618 to 1818, is sometimes credited with being the first to require a one-year postulancy.<sup>53</sup> The Maurists introduced this period of “first probation” in their 1770 constitutions in response to a new French law that prohibited profession before age twenty-one.<sup>54</sup> During the postulancy, the candidates learned the Rule of Benedict and the constitutions of the congregation and engaged in reading and meditation under a *director probandorum*.<sup>55</sup> Other religious

<sup>50</sup> Ibid., 20.

<sup>51</sup> COUNCIL OF TRENT, Session 25, *Decretum de Regularibus et Monialibus*, cap. 15, Dec. 3-4, 1563; in H.J. Schroeder (trans.), *The Canons and Decrees of the Council of Trent*, Rockford, IL, Tan Books and Publishers, Inc., 1978, 226.

<sup>52</sup> Ibid.

<sup>53</sup> See, for example, Paul DELATTE, *The Rule of St. Benedict*, London, Burns Oates & Washburn Limited, 1921, 374 (= DELATTE, *The Rule of St. Benedict*). See also, Hubert VAN ZELLER, *The Holy Rule: Notes on St. Benedict's Legislation for Monks*, New York, Sheed and Ward, 1958, 357.

<sup>54</sup> DELATTE, *The Rule of St. Benedict*, 374.

<sup>55</sup> CONGREGATION OF ST. MAUR, *Constitutiones Congregationis Sancti Mauri* 13, in *Regula S. P. Benedicti et Constitutiones Congregationis Sancti Mauri*, Paris, Typis G. Desprez, 1770, 145.

institutes adopted the practice. For example, the *Rule and Constitutions of the Religious Sisters of Mercy*, founded in Ireland by Catherine McCauley (1778-1841), required a six-month postulancy and a two-year novitiate, which could be reduced to one year by the bishop.<sup>56</sup>

In the early twentieth century, church law required a postulancy for some categories of religious, beginning with sisters (*sorores*). In 1900, Pope Leo XIII, in his apostolic constitution *Conditae a Christo*, recognized religious congregations with simple vows, most of which were communities of women who engaged in apostolic works.<sup>57</sup> In 1901, the Sacred Congregation for Bishops and Regulars issued *Normae* on the organization of such institutes, including a postulancy of six months to one year, with the possibility of an extension of up to three months.<sup>58</sup> In 1911, the Sacred Congregation for Religious, in the decree *Sacrosancta Dei Ecclesia*, required at least two years of postulancy, under pain of invalidity of profession, for lay brothers (*conversi*) in orders of regulars.<sup>59</sup> In 1912, the Sacred Congregation for Religious required a postulancy of at least six months for women entering monasteries of solemn vows with papal enclosure.<sup>60</sup> Thus, on the eve of the codification of canon law, a postulancy of at least six months was required of all religious candidates except those destined for holy orders.

During this same period, church law introduced the requirement of a period of temporary profession before perpetual profession. Movement in this

<sup>56</sup> Catherine McCauley, *The Rule and Constitutions of the Religious Sisters of Mercy* 1.20, in Mary C. Sullivan, *Catherine McCauley and the Tradition of Mercy*, Notre Dame, IN, University of Notre Dame Press, 1995, 315.

<sup>57</sup> Leo XIII, apostolic constitution *Conditae a Christo*, 6 December 1900, in ASS, 33 (1900-1901), 341-347. During the centuries following the Council of Trent, groups of women who lived in community and engaged in external works of the apostolate sought canonical recognition. While they were often approved by diocesan bishops who valued their works of education and charity, the only women recognized by the Holy See as true religious were nuns in solemn vows bound by papal enclosure. With *Conditae a Christo*, Pope Leo XIII provided for canonical recognition of these groups of women as religious congregations of either diocesan or pontifical right. The *Normae* of 1901 provided guidance on the organization of these congregations in which the members made simple rather than solemn vows. Thus, the 1917 Code of Canon Law recognized women religious as either nuns (*moniales*) in solemn vows or sisters (*sorores*) in simple vows (c. 488, 7°).

<sup>58</sup> SACRED CONGREGATION FOR BISHOPS AND REGULARS, *Normae* 65, 28 June 1901, Appendix II, in P. Timotheus Schäfer, *De Religiosis ad normam Codicis Iuris Canonici*, 4th ed., Rome, Typis Polyglottis Vaticanus, 1947, 1110 (= Schäfer).

<sup>59</sup> SACRED CONGREGATION FOR RELIGIOUS, decree *Sacrosancta Dei Ecclesia* 2, 1 January 1911, in AAS, 3 (1911), 30 (= SACRED CONGREGATION FOR RELIGIOUS, *Sacrosancta Dei Ecclesia*).

<sup>60</sup> SACRED CONGREGATION FOR RELIGIOUS, decree *Quo propositum vitae* 3, 15 August 1912, in *fontes* 1/1015.

direction began in 1857 with Pope Pius IX's encyclical *Neminem latet*, in which he decreed that men in institutes which made solemn vows must first make simple vows for three years.<sup>61</sup> The pope explained that the needs of the time called for greater scrutiny to prevent admission of unworthy candidates to solemn profession.<sup>62</sup> Nonetheless, the 1858 decree *Sanctissimus*, from the Sacred Congregation for Bishops and Regulars, affirmed that simple vows were perpetual, at least on the part of the candidate. "By his simple profession, the candidate was truly incorporated into the order and enjoyed all the privileges of the solemnly professed members."<sup>63</sup> Nonetheless, simple vows could be dispensed by the Holy See, and a member in simple vows could be dismissed by the Order.<sup>64</sup> In 1862, Pope Pius IX, in the constitution *Ad universalis*, clarified that the period of simple vows was necessary for the validity of solemn profession in men's orders.<sup>65</sup> In 1902, the Sacred Congregation for Bishops and Regulars, in the decree *Perpensis*, extended to nuns the requirement of professing simple vows for a period of three years before making a valid solemn profession.<sup>66</sup>

Regarding members of congregations with simple vows, the 1901 *Normae* called for a period of temporary vows for a minimum of three years, with the possibility of renewing them annually up to a maximum of six years before perpetual profession.<sup>67</sup> The 1911 decree *Sacrosancta Dei Ecclesia* required lay brothers to remain in simple vows for six years before making solemn profession.<sup>68</sup>

### 3 — *The 1917 Code of Canon Law*

In the years preceding promulgation of the first code of canon law, all religious were required to make a novitiate of at least one year, but there was diversity when it came to canonical requirements for a postulancy and a period of temporary vows. Some of these norms were revised in the 1917 code. The canons "On Religious" were contained in Book II of the Code,

<sup>61</sup> Wolfgang N. FREY, *Act of Religious Profession: A Brief Historical Synopsis and Commentary*, Washington, DC, The Catholic University of America, 1931, 30.

<sup>62</sup> *Ibid.*, 43.

<sup>63</sup> *Ibid.*, 44.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, 45.

<sup>66</sup> *Ibid.*, 46.

<sup>67</sup> SACRED CONGREGATION FOR BISHOPS AND REGULARS, *Normae* 103-106; in SCHÄFER, 1113.

<sup>68</sup> SACRED CONGREGATION FOR RELIGIOUS, *Sacrosancta Dei Ecclesia* 5, p. 31.

“On Persons.” Norms on admission to a religious institute (*religio*) were contained in canons 539-541 on the postulancy, 542-571 on the novitiate, and 572-586 on profession.

Regarding the postulancy, canon 539 § 1 distinguished between institutes with perpetual vows and those with temporary vows and, in institutes of men, between lay brothers and those destined for ordination. Women in religious institutes of perpetual vows were required to complete at least six integral months of postulancy (c. 539 § 1); the major superior could extend that time, but not beyond another six months (c. 539 § 2). The same applied to lay brothers in male institutes with perpetual vows, thus abrogating the 1911 decree *Sacrosancta Dei Ecclesia*. Nevertheless, the postulancy was not prescribed for the validity of the novitiate or profession. Regarding institutes that had only temporary vows, anything related to “the necessity and time of the postulancy” was determined in the constitutions (c. 539 § 1).

In accord with the Council of Trent, the 1917 Code required all candidates for religious life to complete “one integral and continuous year” of a valid novitiate (c. 555 § 1, 2°). All candidates were to have completed at least the fifteenth year of age to be admitted validly to the novitiate (c. 555 § 1, 1°). A religious institute could require a longer novitiate, but such was not necessary for validity unless expressly stated in the constitutions (c. 555 § 2). The Code did not specify a maximum length of time for a novitiate that went beyond a year.

Canon 556 addressed interruptions that might occur during the novitiate year and their effect on the validity of the novitiate. The novitiate year had to begin anew if the novice was 1) dismissed by the superior; 2) left or deserted the house without permission, not intending to return; or 3) remained outside the house beyond thirty continuous or interrupted days, even if he or she returned and/or was absent with permission (c. 556 § 1). The novitiate was not invalidated by an absence of fifteen days or less, and these days did not have to be made up. If a novice was absent, with the permission of the superior or due to coercion—for military service, for example—for more than fifteen days but not more than thirty days, whether continuous or interrupted, the days of absence had to be made up for the validity of the novitiate (c. 556 § 2).

Completion of a valid novitiate was required for the validity of any religious profession (c. 572 § 1, 3°). A candidate had to have completed the sixteenth year of age to make temporary profession and twenty-one years of age to make perpetual profession (c. 573). A minimum of three years of temporary profession was required for the validity of perpetual profession, whether solemn or simple (cc. 572 § 2, 574 § 1). This was true for both men

and women in religious orders which, by definition, had solemn vows (c. 488, 2°), and in congregations that had perpetual vows. A religious had to remain in temporary vows for more than three years if not yet old enough to make perpetual vows (c. 574 § 1). The legitimate superior could extend the period of temporary profession but not for more than another three years (c. 574 § 2).

In summary, the 1917 Code of Canon Law maintained some of the diversity of pre-codal canonical norms regarding the stages of probation and the duration of each stage. The law regarding postulancy varied. Women in institutes that had perpetual vows had a postulancy of at least six months, but not more than twelve. Lay brothers were required to have a postulancy of at least six months, but not more than twelve, while those proceeding to ordination were not required to have a postulancy. All candidates for religious life had to complete a one-year novitiate, although a legitimate absence of fifteen or fewer days did not have to be made up. A longer time could be permitted, but not necessarily for validity. For validity, a minimum of three years in temporary profession was required of all, except those in institutes that did not have perpetual vows. A maximum of six years in temporary profession was permitted.

Thus, the minimum period of probation required by the 1917 Code in an institute that did not have perpetual vows was one year as a novice, minus the fifteen days of legitimate absence that did not have to be made up. The minimum period required by the Code for institutes with perpetual vows was four years for men destined for ordination (one-year novitiate and three years of temporary profession) and four-and-one-half years for lay brothers and women, both nuns and sisters (six-month postulancy, one-year novitiate, and three years of temporary profession)—minus the fifteen days of absence from the novitiate that did not have to be made up. The maximum period permitted by the Code is harder to calculate because there were more variables. For example, canon 539 did not require a postulancy for clerics but did not explicitly prohibit it. Also, the Code permitted a novitiate longer than one year but did not specify a maximum. However, it can be estimated that the maximum period of time in an institute that had perpetual vows was more than seven years for those destined for priesthood (one-year novitiate and six years in temporary vows), and more than eight years for lay brothers and women religious (one-year postulancy, a novitiate of more than one year, plus six years in temporary vows). This represents quite a change from the Rule of Benedict's requirement of a few days knocking on the door, a few days in the guest quarters, and one year as a novice.

#### 4 — *Preconciliar, Conciliar, and Postconciliar Developments*

Although changes in religious life in the last fifty years are generally attributed to the Second Vatican Council, there was already a movement before the Council for religious, especially women, to update their way of life to make it more suitable to the times. Leading the charge was Pope Pius XII, assisted by the Sacred Congregation for Religious. In 1950, he assembled in Rome delegates of religious and secular institutes and societies of apostolic life for the first international congress on accommodation and renewal within the states of perfection, “to discuss and weigh the problems of their common interest.”<sup>69</sup> Among Pius XII’s major concerns was that sisters were not trained adequately for their apostolic works, especially teaching and nursing. At that time, it was common for sisters to begin teaching before they earned college degrees. Many followed the “twenty-year summer school plan” by which they taught in elementary and secondary schools during the regular academic year and spent their summers taking college courses until they completed their degrees.<sup>70</sup> Pope Pius XII, in a series of allocutions after the 1950 congress, advised teaching sisters to be as well trained as their secular school counterparts<sup>71</sup> and sisters who worked in health care to be trained in new methods of treatment, new implements, and new medicines.<sup>72</sup> In 1952, Father Arcadio Larraona, Secretary of the Sacred Congregation of Religious, addressed the International Congress of Mothers Superiors, noting that the Holy See was ready to approve changes in constitutions.<sup>73</sup> Regarding the stages of formation, Larraona recalled that

<sup>69</sup> PIUS XII, Allocution, 8 December 1950, in AAS, 43 (1951), 26. English translation in T. Lincoln BOUSCAREN and James I. O’CONNOR (eds.), *Canon Law Digest for Religious*, Milwaukee, The Bruce Publishing Company, 1964, 87 (= BOUSCAREN and O’CONNOR [eds.], *Canon Law Digest for Religious*).

<sup>70</sup> Patrice M. NOTERMAN, “An Interpretive History of the Sister Formation Conference, 1954-1964,” Diss., Loyola University Chicago, 1988, 6. Accessed at [https://ecommons.luc.edu/luc\\_diss/2563](https://ecommons.luc.edu/luc_diss/2563) (= NOTERMAN, “An Interpretive History”). See footnote 7, p. 6. “The twenty-year plan was the term used to describe the way in which most sister teachers received their formal education. This plan would begin with varying amounts of education received in the novitiate, enough to prepare the sister for the classroom. The sister would then attend summer school for many summers to complete her first degree.”

<sup>71</sup> See, for example, PIUS XII, Apostolic Exhortation of Pius XII to the International Convention of Teaching Sisters, 13 September 1951, in AAS, 43 (1951), 742.

<sup>72</sup> PIUS XII, Allocution, 25 April 1957, in AAS, 49 (1957), 294.

<sup>73</sup> Arcadio LARRAONA, “Concluding Instructions Addressed to the Reverend Mothers General,” 13 September 1952, in *Acta et Documenta Congressus Superiorissarum Generalium*, Rome, Typis Piae Societatis S. Pauli, 1952, 272-273 (= *Acta et Documenta*). The acts of the congress are recorded in English, Italian, German, French, and Spanish. Larraona’s “Concluding Instructions” can also be found in English in *Canon Law Digest for Religious*, 207.

a six-month postulancy was required for all women religious, with a maximum of eighteen months, because “Rome does not want the decision as to admission to be delayed too long.”<sup>74</sup> Nonetheless, he added that Rome would grant permission for a two-year novitiate instead of one, so novices could be employed in works of the institute during the second year, noting that “no formation can be regarded as complete without some contact with the apostolate.”<sup>75</sup> Larraona also provided for a “juniorate,” a period after the novitiate to provide more intense preparation for and initiation into the apostolate.<sup>76</sup> The juniorate could take up part of the period of temporary profession, or all of it.<sup>77</sup> Perhaps to accommodate the juniorate, Larraona said the sacred congregation “is ready to allow up to five years of temporary profession, with the possibility of an extension of one year,” but not beyond six years, in accord with the 1917 Code.<sup>78</sup> The reason for a maximum of six years “is that if a sister has not succeeded in satisfying her superiors as to her vocation during the period of postulancy, noviceship, and six years of temporary vows, it is hardly probable that she will be able to provide this satisfaction in an extended period of probation.”<sup>79</sup>

The Holy See’s recommendation that sisters adapt to the times prompted a shift in how they conceived the stages of admission, particularly temporary profession. The language of “formation” became more prominent than the long-standing emphasis on “probation.” Formation included not only orientation to the prayer and disciplinary life of an institute, but integral human development. Also, a juniorate focused on studies became as important for lay apostolic religious as studies for ordination had always been for religious destined for priesthood. In the late 1940s in the United States, the National Catholic Education Association (NCEA) promoted better education for sisters, an initiative that resulted in the establishment of the Sister Formation Conference in 1954.<sup>80</sup> The NCEA and the Sister Formation Conference promoted the practice of young sisters completing an undergraduate degree before being sent to teach.<sup>81</sup> They also promoted a juniorate period in which

<sup>74</sup> *Acta et Documenta*, 275. *Canon Law Digest for Religious*, 210.

<sup>75</sup> *Acta et Documenta*, 275. *Canon Law Digest for Religious*, 211.

<sup>76</sup> *Acta et Documenta*, 276. *Canon Law Digest for Religious*, 211-212.

<sup>77</sup> *Acta et Documenta*, 276. *Canon Law Digest for Religious*, 212.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> For background on the Sister Formation Conference, see NOTERMAN, “An Interpretive History.”

<sup>81</sup> *Ibid.*, 10.



spiritual training was integrated with professional and academic formation for the apostolate.<sup>82</sup>

The Vatican II decree *Perfectae caritatis* reflects the developments of the preconciliar period regarding formation: “The up-to-date renewal of institutes depends very much on the training of the members. For this reason, non-clerical religious men, and religious women, should not be assigned to apostolic tasks immediately after the novitiate. Their religious, apostolic, doctrinal and technical training should, rather, be continued, as is deemed appropriate, in suitable establishments. They should also acquire whatever degrees they need.”<sup>83</sup> In *Ecclesiae sanctae* II, the norms for implementing *Perfectae caritatis*, Pope Paul VI further emphasized the necessity of post-novitiate formation “under the name of juniorate or scholasticate,” which must normally cover the entire period of temporary vows. “Thus the candidates will be gradually introduced to the kind of life that later on shall be theirs.”<sup>84</sup>

The Sacred Congregation for Religious and Secular Institutes further emphasizes gradualness in its 1969 instruction *Renovationis causam*. “It would appear that in our day and age genuine religious formation should proceed more by stages and be extended over a longer period of time, since it must embrace both the time of the novitiate and the years following upon the first temporary commitment.”<sup>85</sup> The instruction affirms that the novitiate is still the “irreplaceable ... first initiation into religious life,” but young people of the time need better preparation for the novitiate and more gradual formation because too many lack sufficient maturity and doctrinal development to meet “all the demands of the religious and apostolic life of the Institute.”<sup>86</sup>

<sup>82</sup> Ibid., 13-14, 35, 38. See also NOTERMAN, “An Interpretive History,” 97. “For the 1957-58 conferences, the Sister Formation Conference chose the juniorate as the focal point. The juniorate was seen as a new way of reaching personal integration. A period of not fewer than two years (yet not extending over the entire time of temporary vows), the juniorate was to be an exclusive time for spiritual and professional formation under the direction of a trained directress. It was to follow directly after the novitiate.”

<sup>83</sup> VATICAN COUNCIL II, decree *Perfectae caritatis* 18, 28 October 1965, in AAS, 58 (1966), 710. English translation in FLANNERY 1, 621.

<sup>84</sup> PAUL VI, *Ecclesiae Sanctae* II 35, 6 August 1966, in AAS, 58 (1966), 781; FLANNERY 1, 631.

<sup>85</sup> SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, instruction *Renovationis causam* 4, 6 January 1969, in AAS, 61 (1969), 107 (= RC). FLANNERY 1, 639.

<sup>86</sup> Ibid.

The normative section of *Renovationis causam* notes that religious formation consists of the novitiate and the period of temporary profession.<sup>87</sup> A postulancy remains optional, but some manner of preliminary probation is recommended, and it should “neither be too brief nor, as a general rule, be extended beyond two years.”<sup>88</sup> The novitiate must last twelve months to be valid.<sup>89</sup> By way of experimentation, institutes could extend the novitiate up to another twelve months in order to intersperse apostolic periods outside the novitiate house.<sup>90</sup> “These formative apostolic periods may not begin until after a minimum of three months in the novitiate and will be distributed in such a way that the novice will spend at least six continuous months in the novitiate and return to the novitiate for at least one month prior to first vows or temporary commitment.”<sup>91</sup> *Renovationis causam* retains the minimum of three years in temporary profession but extends the maximum from six to nine years.<sup>92</sup>

## 5 — *The 1983 Code of Canon Law*

The 1983 Code of Canon Law, reflecting the conciliar and postconciliar developments, eliminates the distinctions among various categories of religious when it comes to the stages and duration of admission and formation. Any differences that still exist are only in the proper law of individual institutes.<sup>93</sup>

The 1983 Code states that life in a religious institute begins with the novitiate (c. 646). While canon 597 § 2 prescribes that no one can be admitted to an institute of consecrated life “without suitable preparation,” there is nothing more specific in the canons regarding a pre-novitiate experience. There is no mention of a postulancy nor any prescribed period of time for a pre-novitiate stage of formation. The nature and length of “suitable

<sup>87</sup> RC 10.1, FLANNERY 1, 645.

<sup>88</sup> RC 12.2, FLANNERY 1, 646.

<sup>89</sup> RC 21, FLANNERY 1, 648.

<sup>90</sup> RC 24.1, FLANNERY 1, 649.

<sup>91</sup> RC 24.2, FLANNERY 1, 649.

<sup>92</sup> RC 37.1, FLANNERY 1, 654. *Renovationis causam* 34.1 permitted institutes to substitute vows for another form of commitment, such as a promise to the institute, for the period of first profession. This provision was abrogated before promulgation of the 1983 Code of Canon Law.

<sup>93</sup> However, an exception to the uniformity in universal law must be noted since 2016, when Pope Francis issued different norms for contemplative nuns.

preparation” before admission to the novitiate is defined in the proper law of each institute.

Regarding the novitiate, a candidate must have completed seventeen years of age to be admitted validly (c. 643 § 1, 1°) and, for validity, the novitiate must last for twelve months (c. 648 § 1). The 1983 Code does not identify specific causes of interruption that invalidate the novitiate; rather, it details lengths of absence that affect validity. An absence of more than three months, continuous or interrupted, renders the novitiate invalid (c. 649 § 1). An absence of more than fifteen days must be made up (c. 649 § 1). Thus, an absence of sixteen days or twenty days or up to three months does not invalidate the novitiate, but any days over the fifteen must be made up.

There is another possible exception to the minimum of a twelve-month novitiate. The competent major superior can permit first profession to be anticipated, but not by more than fifteen days (c. 649 § 2). In other words, the required twelve months can be cut short by a day or ten days or fifteen days with no effect on validity of first profession. It is not clear in the code whether the twelve-month novitiate can actually be shortened by up to thirty days by combining a fifteen-day absence which does not have to be made up and a fifteen-day anticipation of profession.

The novitiate can also be lengthened. The constitutions can extend this stage of admission and formation to provide for periods of apostolic exercises, but “the novitiate is not to last longer than two years” (c. 648 §§ 2-3). Furthermore, if at the end of the novitiate, there is doubt about the suitability of a particular novice, the major superior can extend “the time of probation,” but not beyond six months (c. 653 § 2). Thus, the novitiate can actually extend to thirty months.

The second stage of admission and formation prescribed by the code is a period of first or temporary profession which, for the validity of perpetual profession, must be at least three years, with the exception that perpetual profession can be anticipated by up to three months (cc. 657 § 3; 658, 2°). Therefore, the minimum period of first profession is actually two years and nine months. The proper law of an institute can require a longer period, but not more than six years all together (c. 655). However, “if it seems opportune,” the major superior can extend the period of temporary profession of an individual religious, but the total period in this stage cannot exceed nine years (c. 657 § 2). Therefore, the usual minimum duration of temporary profession is three years; the usual maximum is six years; and the absolute maximum period a candidate can remain in temporary profession is nine years.

When taking into consideration the norms and the exceptions in the 1983 Code, the minimum amount of time a candidate must be in the novitiate and temporary profession to make a valid perpetual profession is less than four years (one-year novitiate and three years in temporary profession, with exceptions that could reduce each of the stages). The maximum duration permitted is eleven and one-half years (thirty months as a novice and nine years in temporary profession).

In reality, many institutes still require a postulancy of six months to two years, and many now require a two-year novitiate and a period of temporary profession of at least four or five years. For example, the *Constitutions of the Sisters of Life* require a postulancy of up to one year;<sup>94</sup> a two-year novitiate, with the first year being the canonical year and the second being an apostolic year,<sup>95</sup> with the possibility of a six-month extension in accord with canon 653 §2;<sup>96</sup> and first profession made initially for three years and then renewed for two years. “If the time of temporary profession must be prolonged beyond five years for studies, the good of the Sister or another serious reason, it may never exceed nine years.”<sup>97</sup> Likewise, the Dominican Sisters of St. Cecilia have a one-year postulancy, two-year novitiate, and five years of temporary profession.<sup>98</sup>

## 6 — A Different Law for Contemplative Nuns

With the 1983 Code, the universal law provides uniformity among all forms of religious institutes regarding the minimum duration of the novitiate and period of temporary profession and sets a maximum length of time for each of these stages. It is for the proper law of each institute to prescribe variations between the minimum and maximum and to determine the manner and length of preparation prior to admittance into the novitiate.

In 2016, Pope Francis diverged from the uniformity in the universal law when he promulgated new legislation for monasteries of contemplative nuns that requires stages and durations that differ from those required of all other religious, including monasteries of contemplative men and other women

<sup>94</sup> *Constitutions of the Sisters of Life* 75, in *Community Documents: Sisters of Life*, n.p., 2016 (= *SV Const.*).

<sup>95</sup> *Ibid.*, 83.

<sup>96</sup> *Ibid.*, 84 §1.

<sup>97</sup> *Ibid.*, 86.

<sup>98</sup> This information is derived from the website of the Dominican Sisters of St. Cecilia, accessed at <https://www.nashvilledominican.org/vocations/the-formation-process>.

religious. In his apostolic constitution *Vultum Dei quaerere* on women's contemplative life, Pope Francis calls for reflection and renewal on twelve aspects of contemplative religious life for women, including formation.<sup>99</sup> He writes: "In today's social, cultural and religious context, monasteries need to pay great attention to vocational and spiritual discernment, without yielding to the temptation to think in terms of numbers and efficiency."<sup>100</sup> Because candidates must have "ample time" in which to receive adequate formation, he prescribes a period of initial formation of "no less than nine years and not more than twelve."<sup>101</sup>

How those nine to twelve years are distributed among various stages of formation is clarified in *Cor orans*, the 2018 instruction on women's contemplative life from the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. According to *Cor orans*, formation is a "continuous process of growth and conversion" that must be integral, "taking the person as a whole into account so that she develops her own psychic, moral, affective, and intellectual gifts harmoniously and becomes actively involved in community life."<sup>102</sup> The instruction emphasizes gradualness of formation, noting that "the person is built very slowly."<sup>103</sup>

*Cor orans* identifies three stages of initial formation—postulancy, novitiate, and juniorate—preceded by aspirancy.<sup>104</sup> The aspirancy is "a first knowledge of the monastery by the candidate and the candidate by the monastery community" and involves a "series of contacts and times of community experience."<sup>105</sup> It has a minimum duration of twelve months and may be extended by the major superior, but for no longer than two years.<sup>106</sup> The postulancy "is a necessary stage for proper preparation for the novitiate,"<sup>107</sup> which has a minimum duration of twelve months and a maximum of two years.<sup>108</sup> The novitiate is a period of continued discernment regarding one's vocation, as well as a time of trial and of deepening one's friendship with Christ.<sup>109</sup> It has a duration of two years, of which the second is the canonical

<sup>99</sup> *VDq* 12.

<sup>100</sup> *VDq* 15.

<sup>101</sup> *Ibid.*

<sup>102</sup> CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, instruction *Cor orans* 224-225, Vatican City, Libreria Editrice Vaticana, 2018.

<sup>103</sup> *Ibid.*, 253.

<sup>104</sup> *Ibid.*, 251.

<sup>105</sup> *Ibid.*, 262.

<sup>106</sup> *Ibid.*, 268.

<sup>107</sup> *Ibid.*, 269.

<sup>108</sup> *Ibid.*, 275.

<sup>109</sup> *Ibid.*, 277-278, 280.

year.<sup>110</sup> Finally, during the juniorate, the period of temporary profession, the candidate continues her spiritual, doctrinal, and practical formation:<sup>111</sup> “Temporary profession is emitted for three years and renewed annually up to the completion of five years, until a minimum of nine years of initial formation is completed.”<sup>112</sup> This stage can be prolonged, making sure that initial formation does not exceed twelve years.<sup>113</sup>

### *Conclusion*

For seventeen centuries, women and men have been knocking on the doors of religious institutes. For most of this time, they were admitted as permanent members following a few days or months of preliminary probation and a one-year novitiate. In the centuries following the Council of Trent (1545-1563), the stages of initial formation increased in number and duration, so that now church law requires some form of preparation for the novitiate, a novitiate, and a period of temporary profession, all of which adds up to a minimum of about four years in initial formation and a maximum of twelve years. A number of reasons have been given for lengthening the duration of formation. These include, for example, 1) to better ensure perseverance following perpetual profession; 2) to enable a more integrated formation that includes spiritual, intellectual, and psychological development; 3) to provide a gradual transition from increasingly secular cultures to the culture of religious life; and 4) to provide academic and technical training so religious are adequately prepared for the apostolate.

This author is not aware of any research on whether the prolonged period of initial formation actually achieves the purposes indicated above, nor of any studies on whether there are negative consequences when new religious are considered “temporary” for too long. Such research would make a valuable contribution to religious life. Surely the quality of formation programs are as important as their duration. Furthermore, formation should not be a matter of computing months and years just to make sure perpetual profession is canonically valid, but a matter of becoming integrated into “a community of brothers or sisters in Christ, in which God is sought and loved before all things (c. 619).”

<sup>110</sup> Ibid., 279.

<sup>111</sup> Ibid., 286.

<sup>112</sup> Ibid., 287.

<sup>113</sup> Ibid., 288.

## CHARISM, MISSION, AND CANON LAW: MANAGEMENT AS MINISTRY

JOHN P. BEAL

**SUMMARY** — In 2014 and again in 2016, the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life published guidelines for the administration of temporal goods in religious institutes and societies as well as for their sponsored apostolic works. In these instructions, the Congregation called on institutes and societies to examine their sponsored works to assure that their mode of operation remains faithful to their founding charisms. The Congregation charged institutes and societies to conduct a careful inventory of the properties they hold and to clearly designate which of these properties belong to the institute's or society's "stable patrimony." It also offered some clarifications of and elaborations on the law governing the administration of temporal goods, especially the law governing alienation, transactions that can adversely affect the patrimonial condition of the institute or society, and leasing of property.

**RÉSUMÉ** — En 2014 puis en 2016, la Congrégation pour les instituts de vie consacrée et les sociétés de vie apostolique a publié des lignes d'orientation pour l'administration des biens temporels dans les instituts et les sociétés religieuses ainsi que pour leurs œuvres apostoliques parrainées. Dans ces instructions, la Congrégation a demandé aux instituts et aux sociétés d'examiner leurs œuvres parrainées pour s'assurer que leur mode de fonctionnement demeure fidèle à leurs charismes fondateurs. La Congrégation a demandé aux instituts et aux sociétés de procéder à un inventaire minutieux des biens qu'ils détiennent et de désigner clairement ceux qui appartiennent au «patrimoine stable» de l'institut ou de la société. Elle a également offert quelques clarifications et élaborations sur le droit régissant l'administration des biens temporels, en particulier le droit régissant l'aliénation, les transactions qui peuvent affecter négativement la condition patrimoniale de l'institut ou de la société, et la location de biens.

## *Introduction*

The late Father Frank Morrissey, OMI, longtime professor of canon law at Saint Paul University and founding editor of this journal, made important contributions in many areas of canon law, but perhaps no area benefited more from Frank's research, expertise, and attention than the law governing institutes of consecrated life and societies of apostolic life, especially the law governing the administration of their temporal goods. My last conversation with Frank was at Saint Paul University in April of 2019 in connection with the defense of a doctoral dissertation on the administration of the temporal goods of the Society of Jesus in Madagascar. At that time, we briefly discussed two documents that had recently been published by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life on the administration of temporal goods of these institutes and societies. Unfortunately, Frank's death in 2020 prevented him from mining these documents for their nuggets of wisdom to enrich the lives of institutes and societies and to offer his own sage insights into these documents. In Frank's memory, I offer these reflections on the canonical content of these documents, aware that Frank would have performed this task so much better.

### *1 — Two Documents on the Administration of Temporal Goods*

In August of 2014, the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life issued a circular letter entitled *Guidelines for the Administration of the Assets in Institutes of Consecrated Life and Societies of Apostolic Life*.<sup>1</sup> This circular letter followed on a symposium convoked by the Congregation in May of the same year on *Management of Ecclesiastical Assets of Institutes of Consecrated Life and Societies of Apostolic Life in the Service of Humanity and the Mission of the Church* in which a large number of general superiors and treasurers of institutes and societies participated. This symposium, which focused primarily on the temporal goods of institutes and societies themselves, underscored the fact that the assets of these institutes and societies are "ecclesiastical assets" since they belong to public juridic persons in the Church, each with its own proper

<sup>1</sup> CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE (CICLSAL), Circular letter *Guidelines for the Administration of Assets in Institutes of Consecrated Life and in Societies of Apostolic Life*, 2 August 2014, Vatican City, Libreria Editrice Vaticana, 2014 (= *Guidelines*).



ecclesial mission.<sup>2</sup> In the course of the symposium, “it was further pointed out that transparent and professional management are useful tools for the mission of each Institute.”<sup>3</sup> In November of 2016, the Congregation convoked a second symposium, this one focused on the charismatic significance of the assets of institutes and societies: *Rethinking economic matters in a manner faithful to the charism*. This symposium led the Congregation to publish in January of 2018 an additional set of Guidelines entitled *Economy at the Service of Charism and Mission: Boni dispensatores multiformis gratiae Dei*.<sup>4</sup> Intended to “continue a journey of ecclesial reflection on the assets of institutes and societies and their management,” these guidelines “recall and explain some canonical aspects regarding temporal goods” and “suggest some tools for planning and programming with respect to the management of works.”<sup>5</sup> If the first symposium and subsequent circular letter focused on the need for those responsible for the assets of institutes and societies to be accountable and their duty to protect these assets by exercising due oversight and control over their administration,<sup>6</sup> the second symposium and the guidelines that resulted from it direct attention to the need for institutes and societies to scrutinize their “works” or sponsored apostolates to ensure that they still are faithful to their founding charisms.

### 1.1 — Fidelity of “Works” to the Founding Charism

The discussions at the two symposia made clear that religious institutes and societies of apostolic life face numerous challenges as they navigate the twenty-first century. Not the least of these challenges involve the ways in which institutes and societies carry out their ecclesial mission through sponsored works. Declining numbers of vocations make it impossible for members to be as personally present and involved as they once were at all levels of these apostolic institutions and so by their presence to imbue the works with the charism of the institute or society. At the same time, institutes and societies and their works find themselves enmeshed in changed economic systems that exert a strong pull toward “seeking the technical and organizational efficiency of material resources and works, rather than the efficacy of

<sup>2</sup> *Guidelines*, 3-4.

<sup>3</sup> *Guidelines*, 4.

<sup>4</sup> CICLSAL, *Guidelines Economy at the Service of the Charism and Mission: Boni dispensatores multiformis gratiae Dei*, 6 January 2018, Vatican City, Libreria Editrice Vaticana, 2018, §3,11-12 (= *Economy*).

<sup>5</sup> *Economy*, §3,12-13.

<sup>6</sup> *Economy*, §3, 13.

action in light of the Gospel.”<sup>7</sup> As a result, the circular letter calls on each institute and society “to undertake a review of the mission as an expression of the charism to verify if the charismatic identity of established works continues to emerge in the current operational activities.”<sup>8</sup>

This review is to be an opportunity for members of institutes and societies at all levels, both superiors and members, “to rethink the economic reality in a manner faithful to each charism so as to be ‘for the Church and for the world, the outpost of care for all of the poor and for all material, moral and spiritual poverty, and examples in overcoming every form of egoism through the logic of the Gospel which teaches us to trust in the providence of God’.”<sup>9</sup> In conducting this review, “fidelity to the charism and the mission remains ... the fundamental criterion for evaluating the works, in fact, ‘profitability cannot be the only criterion to keep in mind’.”<sup>10</sup> Sometimes, particular works have figured in the life of an institute or society so long and so prominently that they have come to define the spirit of the institute. However, the mission of an institute or society is not exhausted by its works or institutional apostolates. Indeed, “the works ... should not be identified with the mission: they constitute the modality in which the mission makes itself visible, presupposes it, but does not exhaust it or define it.”<sup>11</sup> When a review of the institute’s or society’s mission reveals that “works are no longer managed in a manner consistent with the current expression of the mission,”<sup>12</sup> it may be necessary for the institute or society to “define which ‘works and activities it should continue, which should be eliminated or modified, and which new frontiers it should begin to pursue and demonstrate as responding to today’s need in full fidelity to its own charism’.”<sup>13</sup>

## 1.2 — Formation for Management as a Ministry

*Economy at the Service of the Charism and Mission* recognizes that management of the assets and works of institutes and societies has become such a complex and specialized undertaking that, in most institutes and

<sup>7</sup> *Economy*, §12, 25.

<sup>8</sup> *Guidelines*, §1.1, 7.

<sup>9</sup> *Economy*, §4, 13. Citing Pope FRANCIS, nuntius ad Venerabilem Fratrem Iannem Cardinalem Braz del Aviv Prefectum Congregationis pro Institutis Vitae Consecratae et Societatibus Vitae Apostolicae, 8 March 2014, in AAS, 106 (2014), 285.

<sup>10</sup> *Economy*, §15, 29-30. Citing Pope FRANCIS, encyclical letter *Laudato si*, 24 May 2015, in AAS 107 (2015), 921, §187.

<sup>11</sup> *Economy*, §23, 42-43.

<sup>12</sup> *Economy*, §35, 61; *Guidelines*, §1.1, 8.

<sup>13</sup> *Economy*, §35, 61; *Guidelines*, §1.1, 8.

societies, it is “entrusted to one person, namely the treasurer, who is given a duty requiring technical skill.”<sup>14</sup> This concentration of knowledge about and responsibility for the financial affairs of the institute or society and its works into fewer and fewer hands has often “generated a lack of interest regarding finances among other members of the community, resulting in their losing touch with the cost of living and the burdens of management, a distancing from the surrounding reality, and a dichotomy between finances and mission.”<sup>15</sup> As a result, the Congregation urges institutes and societies to ensure that both initial and ongoing formation of all members provide them a solid grounding in the economic realities in which their institutes and societies are immersed. “Initial formation should include programs on finance and management, on the costs of community life and the costs of the missions, as well as on accountability for living the vow of poverty in the context of the current socio-economic situation.”<sup>16</sup> On an ongoing basis, members should be made aware “of the important discipline of working with budgets and financial projections, making sure that they are reflective of the values and spirit of the Institute.”<sup>17</sup> Immersion in the details and pressures of finances can dull the sensibilities of community treasurers to “the evangelical principles on which financial transactions are based.”<sup>18</sup> Thus, the specific preparation of treasurers should not only provide them with the needed managerial and accounting skills but “sensitize [them] to the evangelical principles on which financial transactions should be based.”<sup>19</sup> In the course of this preparation treasurers and future treasurers should become aware that “not all management practices correspond to evangelical principles, nor might they be in accord with their social teaching of the Church.”<sup>20</sup> Since, depending on the proper law of the institute or society, treasurers are to be appointed or elected for a definite term, new treasurers should take office only after “an appropriate transition process that includes training courses and coaching periods.”<sup>21</sup>

<sup>14</sup> *Guidelines*, §3, 20; *Economy*, §18, 35.

<sup>15</sup> *Guidelines*, §3, 20; *Economy*, §18, 35.

<sup>16</sup> *Guidelines*, §3, 21.

<sup>17</sup> *Guidelines*, §3, 21.

<sup>18</sup> *Guidelines*, §3, 21.

<sup>19</sup> *Guidelines*, §3, 21.

<sup>20</sup> *Guidelines*, §3, 21.

<sup>21</sup> *Economy*, §64, 95. The Code itself does not stipulate that canonical provision of the office of treasurer in an institute or society be for a defined term. This provision of *Economy* will have to be considered when general chapters next revise the proper law of their institutes or societies.

### 1.3 — The Compatibility of Professionalism and Charismatic Activity

Despite the emphasis of both the Guidelines and *Economy at the Service of Mission* on the need for institutes and societies to be faithful to their charisms and to eschew management techniques that do not “correspond to the principles of the Gospel and are [not] in agreement with the social teaching of the Church,”<sup>22</sup> the two documents also insist that institutes and societies need “to overcome the mentality that considers the designing and planning of activities and works to be antithetical to openness to the creativity of the Spirit.”<sup>23</sup> To the contrary, “where insufficient attention is paid to management problems, the result is the nullification of the mission itself. Consecrated life offers the world an evangelical witness when it keeps alive the apostolic inspiration and guarantees the sustainability of the works through informed and balanced management.” Since the temporal goods of institutes and societies are ecclesiastical goods, an integral dimension of sound management is adherence to the norms of both canon and secular law. As a result, the Guidelines and *Economy at the Service of Charism and Mission* “recall and explain some canonical aspects regarding temporal goods with particular reference to the practice of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.”<sup>24</sup>

### 1.4 — The Ecclesial Nature of Temporal Goods and Works

Both Guidelines and *Economy in the Service of the Charism and Mission* underscore the fact that, although the assets and often the apostolic works of religious institutes and societies of apostolic life belong to these institutes and societies, they are genuinely “ecclesiastical” and, therefore, “destined to the attainment of the purposes of the Church,”<sup>25</sup> viz., “to order divine worship, to care for the decent support of the clergy and other ministers, and to exercise the works of the apostolate and of charity, especially toward the needy.” (c. 1254 § 2) Institutes and societies should, therefore, strive to integrate their own activities and their institutional apostolates into the overall pastoral plans of the dioceses in which their works are located and consult with the diocesan bishops about plans for expansion, modification or closure of works.<sup>26</sup> In particular, “before the closure of a community or of a work—for which the

<sup>22</sup> *Economy*, §12, 25.

<sup>23</sup> *Economy*, §35, 61.

<sup>24</sup> *Economy*, §4, 13.

<sup>25</sup> *Economy*, §31, 85; *Guidelines*, §2.1, 16-17.

<sup>26</sup> *Economy*, §29, 50-51.

prior consultation of the diocesan bishop (canon 612 and 678, §3) is requested—the possibility of concrete alternative solutions can be discussed.”<sup>27</sup> For their part, diocesan bishops are urged “to appreciate consecrated persons as ‘*a living memorial of Jesus’ way of living and acting,*’ instead of seeing [religious men and women] in terms of utility and functionality.”<sup>28</sup>

### 1.5 — The Juridic Weight of the Documents

Although the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life has identified the two documents under consideration as, respectively, a circular letter and guidelines, they are both in the nature of instructions, which “clarify the prescripts of laws and elaborate on and determine the methods to be observed in fulfilling them.” “[G]iven for the sake of those whose duty is to see that the laws are executed,” they “oblige them in the execution of the laws.” (c. 34 §1) Both the Guidelines and *Economy in the Service of Charism* contain numerous elaborations on and specifications of the law governing the administration of temporal goods for the guidance of chapters and superiors in institutes and societies. Although presented as “operational recommendations,”<sup>29</sup> the specific directives in the documents are consistent with the obligation of chapters to “establish suitable norms concerning the use and administration of goods, by which the poverty proper to it is to be fostered, protected and expressed” (c. 635 §1) and of superiors who “are to fulfill their function and exercise their power according to the norm of universal and proper law” (c. 617). The elaborations on the law found in these documents should, therefore, be considered binding, unless they are contrary to the law they seek to explicate (c. 34 §2).

## 2 — Responsibilities of Chapters, Superiors, and Councils

Both the Congregation’s Guidelines and *Economy at the Service of the Charism and Mission* charge individuals and groups with authority in institutes and societies with administrative responsibilities. These are intended to ensure that the temporal goods of the institutes themselves as well as of their

<sup>27</sup> *Economy*, §94, 125. *Economy*, §29, 51 and *Guidelines*, §2.1, 17.

<sup>28</sup> *Economy*, §30, 52. Citing Pope JOHN PAUL II, apostolic exhortation *Vita consecrata*, 25 March 1996, in AAS, 98 (1996), 396, §22. Emphasis in the original.

<sup>29</sup> *Guidelines*, IV, 83.

works are administered in a way that is not only financially sound but faithful to their charisms and missions. The responsibilities extend to both chapters and to superiors and their councils.

## 2.1 — Responsibilities of Chapters

*Economy at the Service of the Charism and Mission* recalls several responsibilities proper to chapters of religious institutes and societies of apostolic life whose competence it is to enact and, as needed, amend the proper laws of their institutes or societies. First, it is the responsibility of the chapter to stipulate in the proper law of the institute or society “what are extraordinary administrative acts [for superiors at various levels] and the procedure necessary for carrying them out (cf. can. 638 § 1 and 1281)” and to establish “the maximum sum for extraordinary administrative acts for the individual provinces.”<sup>30</sup> The instruction does name several transactions that the Congregation considers to be acts of extraordinary administration and that ought to be recognized as such in the proper law of the institute or society: purchases of real estate, new construction<sup>31</sup> and incurring of indebtedness.<sup>32</sup>

Second, chapters are to ensure that the proper law of the institute clearly spells out the authority competent to designate the assets that belong to the stable patrimony of the institute or society. In fact, the documents insists:

This provision must appear in the fundamental code or in another normative document of proper law, with the following text or one of similar tenor: *The stable patrimony consists of all the immovable and movable property that by means of a specific assignment are destined to guarantee the economic security of the institute. For the goods of the entire institute, the General Chapter or the General Superior with the consent of his/her Council makes this assignment. For the assets of a province as well as for the assets of a legitimately established house, the Provincial Chapter or other similar assemblies (cf. can 632), or the Provincial Superior with the consent of his/her Council and confirmed by the Superior General makes this assignment.*<sup>33</sup>

*Economy at the Service of the Chrism and Mission* also entrusts to general chapters several functions that are not explicitly called for by the Code of Canon Law. First, it is the task of the General Chapter “to establish the fundamental ways of proceeding in economic matters and to elaborate a *charismatic plan* of the institute which also provides corresponding

<sup>30</sup> *Economy*, §58, 92.

<sup>31</sup> *Economy*, §76, 106.

<sup>32</sup> *Economy*, §87, 117.

<sup>33</sup> *Economy*, §38, 65-66. Emphasis in the original.

directives.”<sup>34</sup> This charismatic plan, the fruit of communal discernment by the whole institute or society, is to set the context within which Superiors and their Councils make operative decisions about the assets and works of the institute or society. Second, the general chapter is charged to prepare and approve “an *economic procedures manual* or other similar text, which ... promotes a way of proceeding that is, as much as is feasible, in conformity with the institute’s charism, its mission, and the guidance of poverty.”<sup>35</sup>

*Economy at the Service of the Charism and Mission* stipulates that the treasurers at various levels of institutes and societies are, in accord with the norm of proper law, to be elected or appointed for defined terms. Although the proper laws of some institutes and societies do already stipulate defined terms for community treasurers, the requirement of terms for treasurers has not hitherto been part of the general law of the Church. Since the introduction of such terms where they do not yet exist will require amendments to the proper laws of institutes and societies, it is a task that belongs to the general chapter.

## 2.2 — Responsibilities of Superiors and Councils

Superiors and, under their direction, treasurers of institutes of consecrated life and societies of apostolic life have the responsibility for the day-to-day management of the temporal goods of their institutes and societies and of their associated works. Superiors and treasurers may also be required in some instances, as specified in the universal or proper laws, to seek the advice or consent of councils before placing an important act of administration.

Both the Congregation’s *Guidelines* and *Economy at the Service of the Charism and Mission* charge those in positions of leadership in institutes and societies, especially superiors and their councils, with the task of completing a thorough inventory of the property holdings of their institutes or societies as well as of their sponsored apostolates.<sup>36</sup> Once they have been legitimately erected by competent ecclesiastical authority, religious institutes and societies of apostolic life themselves, their provinces or other similar subdivisions, and, unless their proper laws provide otherwise, individual houses are public juridic persons in the Church (cc. 634 § 1 and 741 § 1). As such, they are subjects of ownership of property which is “church property” (*bona*

<sup>34</sup> *Economy*, §38, 91. Emphasis in the original.

<sup>35</sup> *Economy*, §38, 91.

<sup>36</sup> *Guidelines*, §1.4, 14-16; *Economy*, §38, 65.

*ecclesiastica*) and, therefore, subject to the norms of canon law. In North America, where secular law does not acknowledge the status of the Church's public juridic persons, recognition of the status of some or all parts of institutes and societies in the secular law of the places where they are located is usually secured by adopting some form of civil incorporation.

### 2.2.1 — *Accountability and transparency*

The responsibility for financial administration brings with it the concomitant need for accountability and transparency, which are necessary for generating and maintaining trust both within institutes and societies and with the larger public.<sup>37</sup>

Trust capital cannot be compromised by situations or events that weaken the credibility of institutes of consecrated life or societies of apostolic life in the civil or ecclesial community, thereby making "problematic" the personal and collective witness of consecrated poverty. In fact, a culture of transparency is an aspect of fidelity to one's own history and charismatic practice of the vow of poverty.<sup>38</sup>

Regular and well publicized financial statements are a critical component for accountability by superiors for their administration of the assets of their institutes and societies by providing them the opportunity "to account for their actions, their choices, and moreover their behavior."<sup>39</sup> By giving superiors "the ability to communicate the reasons/motivations that guide management and management decisions, as well as the corresponding commitment to respond to problems or critical issues as they arise,"<sup>40</sup> accountability and financial statements enhance "the credibility of the person who puts them in place and, therefore, help to increase trust."<sup>41</sup> To ensure transparency and accountability, the accuracy of financial statements should be attested by outside auditors.<sup>42</sup>

### 2.2.2 — *The finance council*

Canons 634 to 640 of Book II of the Code of Canon Law deal with the "Temporal Goods and their Administration" of religious institutes, and

<sup>37</sup> *Economy*, §41, 72.

<sup>38</sup> *Economy*, §43, 73.

<sup>39</sup> *Economy*, §42, 71-72.

<sup>40</sup> *Economy*, §42, 72.

<sup>41</sup> *Economy*, §43, 73.

<sup>42</sup> *Guidelines*, §1.3, 13-14.



canons 718 and 741 address the administration of the property, respectively, of secular institutes and societies of apostolic life. None of these canons explicitly mentions the establishment and role finance councils in institutes and societies. However, *Economy at the Service of the Charism and Mission* recalls that, since they are public juridic persons in the Church, institutes and societies as well as their provinces are to have councils for economic affairs or some similar advisory bodies to assist the superior and treasurer in the administration of the goods of the institute or society.<sup>43</sup> These finance councils can include non-members of the institute or society with knowledge and skill in business and finance. Although the organization and specific roles of these finance council is left to the proper law of the institute or society and the statutes of the councils themselves, the instruction does add one critical precision: for the performance of acts of extraordinary administration, a superior must at least consult the finance council as well as receive the consent of his or her council.<sup>44</sup> Failure to carry out this required consultation will result in the invalidity of the act (c. 127 § 2, 2°).

### 3 — *Apostolic Works and Stable Patrimony*

The sponsored apostolates or “works” of institutes and societies have, historically, emerged as parts of their external ministries or, in more canonical terms, as extensions of their juridic persons. As a result, the property of the institutes and societies often was, at least at their origins, coextensive with that of their “works.” However, with the passage of time, a variety of factors have prompted institutes and societies to incorporate their sponsored apostolates separately from the institutes and societies themselves. *Economy at the Service of the Charism and Mission* acknowledges the practicality and legitimacy of this development. The institutes and societies

... ordinarily possess the operational assets of the communities. However, with reference to the works there are very different models, often regulated by the different modes of relationship between State and Church, by the specific demands of the nature of similar works, and/or by the size of the activity. Thus, while in some cases the works are owned by institutes of consecrated life and societies of apostolic life, in other cases, they exist as distinct legal entities.<sup>45</sup>

<sup>43</sup> *Economy*, §61, 93.

<sup>44</sup> *Economy*, §61, 93.

<sup>45</sup> *Economy*, §53, 86-87.

Unfortunately, the process of incorporating “works” separately from their sponsoring institutes and societies has led to considerable confusion and misunderstanding about the ownership and canonical status of their assets. This has been fostered by at least two factors: 1) the widespread acceptance at least by administrators and governing boards of sponsored apostolic institutions of the so-called “McGrath thesis” according to which separate incorporation of these “works” inexorably results in severing the legal bonds between institutes or societies and their sponsored apostolates and the alienation of property from the institutes or societies to the sponsored apostolates; and 2) the frequent confusion of “sponsorship” of an apostolic endeavor with “ownership” of its property.

### 3.1 — The “McGrath Thesis”

In 1968, John J. McGrath, professor of canon law and civil law at The Catholic University of America, published a monograph entitled *Catholic Institutions in the United States: Canonical and Civil Law Status*.<sup>46</sup> The position he espoused therein has come to be known as the “McGrath thesis” and can be summarized in three points. 1) Civil incorporation of charitable and educational apostolates renders them solely the creature of the secular government that incorporates them and severs them juridically from the Church and from the religious organization under whose sponsorship they were founded and operate.<sup>47</sup> 2) These incorporated apostolates are related to the Church and the sponsoring institute or society, if at all, only through the ongoing inspiration and influence of the founding and sponsoring entity but not in any juridic way.<sup>48</sup> 3) The property of these institutions now belongs to the civil corporation, not to the sponsoring church entity and is, therefore, not church property subject to canon law.<sup>49</sup> The validity of the “McGrath thesis” was never accepted by the Holy See<sup>50</sup> and was vigorously contested by (then) Father Adam Maida in a monograph published in 1975.<sup>51</sup> Both

<sup>46</sup> JOHN J. MCGRATH, *Catholic Institutions in the United States: Canonical and Civil Law Status*, Washington, Catholic University of America Press, 1968 (= MCGRATH, *Catholic Institutions*).

<sup>47</sup> *Ibid.*, 32-33.

<sup>48</sup> *Ibid.*, 33-36.

<sup>49</sup> *Ibid.*, 36-38.

<sup>50</sup> CONGREGATION FOR CATHOLIC EDUCATION and CONGREGATION FOR RELIGIOUS INSTITUTES AND SOCIETIES OF APOSTOLIC LIFE, letter, 7 October 1974, Prot. NN. SCI 427/70/23 and SCRIS 300/74, in *CLD*, 9:369-371. “We wish to make it clear that this thesis [the “McGrath thesis”] has never been considered valid by our Congregations and has never been accepted.”

<sup>51</sup> ADAM MAIDA, *Ownership, Control and Sponsorship of Catholic Institutions: A Practical Guide*, Harrisburg, Pennsylvania Catholic Conference, 1975.

insisted that, in itself, civil incorporation of sponsored apostolates of institutes and societies effected no change in the ownership of property, i.e., if an institute or society owned the property of its school or hospital at the time of its civil incorporation, it continued to hold title to the property after incorporation.<sup>52</sup> Nevertheless, the “McGrath thesis” received a warm welcome, especially from administrators and governing boards of Catholic educational institutions, since it seemed to relieve them of the burden of complying with canon law in general and its norms governing temporal goods in particular. Acting in accord with the “McGrath thesis,” some institutes and societies formally transferred assets from the sponsoring body to the sponsored apostolate with, but sometimes without, the observance of canonical formalities for alienation. In other cases, institutes and societies simply assumed that assets had transferred to the sponsored apostolate on civil incorporation and considered their responsibility for administering the property in accord with canon law to have ceased. In either case, the “McGrath thesis” has led to considerable confusion and occasional conflict about the civil and canonical status of temporal goods held by educational and charitable institutions sponsored by religious institutes and societies of apostolic life.<sup>53</sup>

### 3.2 — *Confusion of “Ownership” and “Sponsorship”*

The canonical and civil status of apostolic institutions or “works” of institutes and societies has also been obscured by a tendency to confuse “sponsorship” of apostolic institutions with “ownership” of their property. The Code of Canon Law itself does not define “ownership,” but its meaning has been elaborated in the canonical tradition going back to classical Roman law as the right to retain, administer, enjoy, and alienate temporal goods lawfully acquired.<sup>54</sup> “Sponsorship,” on the other hand, is less focused on the property of an institutional apostolate than on the relationship between such an apostolate and an institute, society or some other Church entity. As a working definition, Morrissey suggested that “sponsorship” is “a formal relationship between a recognized Catholic organization and a legally formed entity entered into for the sake of promoting and sustaining the Church’s

<sup>52</sup> See *ibid.*, 31-40.

<sup>53</sup> See the documentation of the conflict between the Archbishop of Saint Louis and the trustees of Saint Louis University over the sale of Saint Louis University Hospital to a for-profit health care chain in “Saint Louis University Hospital Sold to For-Profit Corporation,” in *Origins*, 27 (1998), 629, 631-633.

<sup>54</sup> See canon 1254 § 1.

mission in the world.”<sup>55</sup> The norms of canon law focus primarily on the temporal goods owned by public juridic persons in the Church; discussions of sponsorship typically focus on structures and methods by which the sponsoring institutes or societies can exert influence to keep their apostolates faithful to the founding charism and mission.<sup>56</sup> Since sponsorship can be exercised even without ownership, some institutions and societies have accepted the erroneous notion that transfers of ownership of the assets of sponsored apostolate from the sponsoring institute or society to the apostolate do not constitute alienation as long as the sponsoring institute or society retains sufficient reserved powers to maintain the Catholic identity of the apostolate. However, alienation is, by definition, the transfer of ownership of property from one person, physical or juridic, to another. Even if a contract transferring the assets contains a reversionary clause that provides for the return of the property to the sponsoring institute, these assets would revert to the sponsor only when the apostolate is dissolved, not when the sponsoring institute or society might need them. Ceding ownership of the assets of sponsored apostolates may be a prudent strategy, and adequate assurances that the apostolate will operate in conformity with the charism and mission of the sponsor may be embedded in its governing documents.<sup>57</sup>

<sup>55</sup> Francis MORRISEY, “Various Types of Sponsorship,” in Rosemary SMITH, Warren BROWN and Nancy REYNOLDS (eds), *Sponsorship in the United States: Theory and Praxis*, Alexandria, VA, 2006, 19 (= *Sponsorship in the United States Context*).

<sup>56</sup> Religious institutes and societies of apostolic life and their several parts are public juridic persons in virtue of the law itself. Although schools, universities, hospitals, and other educational and charitable institutions established by institutes and societies can be erected as public juridic persons by competent ecclesiastical authority, the vast majority of such institutions in North America have not, in fact, been so erected. Ownership of the property of a sponsored apostolate may provide the institute or society the legal leverage needed to ensure that it operates in a manner consistent with the charism and mission of the sponsoring institute or society. When an institute or society loses operational control over its institutional apostolate through changes in its governance structure, ownership of property may be insufficient to secure its Catholic identity. On the other hand, institutes and societies may ensure that their institutional apostolates are operating in conformity with their charisms and missions even without ownership of the property through judicious use of reserved powers guaranteed to the sponsor in the corporate charters and by vigorous monitoring for “mission effectiveness.” However, both “absentee ownership” of institutional apostolates and benign neglect in claiming and exercising the prerogatives of sponsorship often begins an inexorable drift away from the founding charism and mission. See John BEAL, “From the Heart of the Church to the Heart of the World: Ownership, Control and Catholic Identity of Institutional Apostolates in the United States,” in *Sponsorship in the United States Context*, 17-30.

<sup>57</sup> *Economy*, §85, 114-115: “It is advisable to consider whether works of considerable size should be distinct from the institute of consecrated life or from the society of apostolic life, according to what is or will be established by universal and proper law. The solution may be determined in various ways according to the specific circumstances. One should ensure

Nonetheless, the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life is insistent that such transfers of assets do indeed constitute alienation and, if the value of the property so alienated is great enough, will trigger the need for the institute or society to observe the canonical norms governing alienation. Indeed, transfer of ownership of assets to sponsored civil entities can “[i]n no case ... be used in any manner to circumvent the canonical controls.”<sup>58</sup> Thus, “[w]hen the value of the goods to be transferred to the civil entity, even if connected to the institute, exceeds the maximum sum established for each Region, the permission of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life is required.”<sup>59</sup>

### 3.3 — Elements of the Stable Patrimony of an Institute or a Society

Uncritical acceptance of the “McGrath thesis” by many and widespread confusion of sponsorship and ownership have led to considerable lack of clarity about what temporal goods are at the disposal of institutes and societies to secure their futures, and which are not. Thus, completion of a thorough inventory of the temporal goods of institutes and societies is a prerequisite for superiors and their councils (or other authorities as designated in the proper law) to fulfill their obligation of determining which assets already belong or should belong to their “stable patrimony.”<sup>60</sup> Although “stable patrimony” is not defined in the Code of Canon Law, its meaning is rooted in canonical doctrine where the stable patrimony of an institute or society is understood to be “a permanent endowment (whether capital goods or income) of the juridic person for the purpose of facilitating the realization of the goals of the institute and insuring economic self-sufficiency.”<sup>61</sup>

fidelity of the work to the charism of the institute and its compliance with established modes of relations between State and Church.” *Economy*, §89, 121, recognizes that to maintain fidelity to charism and mission, “the methods that can be used are many, for example: the provision in the statutes of associated civil entities stating purposes similar to those of institutes of consecrated life and societies of apostolic life; the attribution to the governing bodies of the institutes and companies the power to appoint the managers, to approve the extraordinary administrative acts of the associated civil entities; the provision of obligatory reports to institutes by the heads of associated civil entities; the insertion in the statutes of such institutions of a clause that, in the case of dissolution, indicates that the residual patrimony returns to the institute of consecrated life or society of apostolic life, to another connected civil institution or another institute or society with similar characteristics.”

<sup>58</sup> *Economy*, §89, 121.

<sup>59</sup> *Economy*, §90, 121-122.

<sup>60</sup> *Guidelines*, §1.4, 15; *Economy*, §38, 65.

<sup>61</sup> *Guidelines*, §1.4, 14-15.

The “stable patrimony” of an institute usually consists of a variety of temporal goods, real and personal, tangible and intangible, that are critical to the continued existence and mission of the institute or society. These should include at least: 1) “real estate, such as, for example, the places where the works function, the community houses, the residences for the elderly or sick members, the assets which are particularly relevant from a historico-artistic point perspective or which are a part of the beginnings or patrimony of the institute itself, such as the motherhouse;”<sup>62</sup> 2) personal property consisting of durable goods such as furnishings, vehicles, and equipment which are purchased with the intention of retaining them for the duration of their useful life and without which buildings would be uninhabitable or the works could not be carried out; 3) “real estate that provides income for the support of the institute, the province or the religious house;”<sup>63</sup> 4) “movable property that provides income for the support of the institute, the province, or the religious house and for the realization of their respective missions,” i.e., “capitalized moveable assets invested in different forms in the financial system;”<sup>64</sup> 5) “the immovable and moveable property which, having historical, artistic or intrinsic value, constitute the so-called cultural heritage, the historical memory of the institute, the province, or the religious house;”<sup>65</sup> and 6) “the protection and security fund” or “*emergency fund*” [which] provides appropriate protection for the institute in the presence of complex operations that may expose it to significant economic risks.”<sup>66</sup>

Both the Guidelines and *Economy at the Service of the Charism and Mission* emphasize the seriousness of the obligation of superiors (or other authorities as stipulated in the proper law of the institute or society) to designate the assets of the institute or society which constitute its “stable patrimony”<sup>67</sup> by requiring the consent of the superior’s council for the designation. Without this consent, the superior’s action would be invalid (c. 127 §1). Thus, the Congregation has, in effect, recognized designation of assets as part of an institute’s or society’s “stable patrimony” to be an act of extraordinary administration for superiors.

No doubt because of the considerable confusion that has developed over the years about what temporal goods actually are part of institutes’ and societies’ stable patrimony, the Congregation has emphasized the necessity of

<sup>62</sup> *Economy*, §39, 66-67.

<sup>63</sup> *Economy*, §39, 67.

<sup>64</sup> *Economy*, §39, 67.

<sup>65</sup> *Economy*, §39, 67-68.

<sup>66</sup> *Economy*, §39, 68.

<sup>67</sup> *Guidelines*, §1.4, 15-16; *Economy*, §38, 65.

explicit designation of assets to stable patrimony. This emphasis on explicit designation should not, however, be construed as a repudiation of canonical tradition that has held that “legitimate designation” (c. 1291) of property as part of a juridic person’s stable patrimony can be either explicit or implicit. Implicit designation occurs when an asset is acquired with the intention of retaining it for an extended period of time to serve as part of the foundation of the institute or society and its mission. Evidence of the Congregation’s continued recognition of implicit designation for the constitution of an institute’s or society’s stable patrimony can be seen in its characterization of purchases of real estate and construction of new buildings, transactions which are generally only entered into with the intention of holding the new assets for an indefinite period, as “acts of extraordinary administration, no matter what the amount.”<sup>68</sup>

### 3.4 — Transactions Affecting Stable Patrimony

“Stable patrimony” is a concept critical to oversight of the administration of church property (*bona ecclesiastica*) by Church authorities. Once the competent authorities of an institute or society have legitimately designated assets as belonging to its stable patrimony, these assets, if their value exceeds the limits set for the region, cannot be alienated validly without observance of the canonical norms for alienation. Moreover, transactions that can jeopardize this stable patrimony may trigger these same formalities, including, in some cases, the requirement to seek the permission of the Apostolic See. For example, “purchase of assets, new construction and renovation” require permission from the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life if the institute or society “would need to resort to credit for financing the operation in an amount that exceeds the maximum sum provided for each individual region.”<sup>69</sup> Since designation of assets as part of the institute’s or society’s stable patrimony restricts the freedom of superiors in dealing with these assets, it can be tempting for them to try to retain a free hand in dealing with temporal goods and to avoid the burden of “canonical red tape” by taking a minimalist approach to designating stable patrimony. However, such a strategy is forbidden by the Congregation: “it is not permitted to proceed with the assignment of the stable patrimony for the sole purpose of avoiding the requirements of the canon law on alienation.”<sup>70</sup> While they may appear burdensome, the canonical formalities are

<sup>68</sup> *Economy*, §75, 105.

<sup>69</sup> *Economy*, §76, 106.

<sup>70</sup> *Economy*, §40, 68.

meant to ensure that transactions that touch on an institute's or society's stable patrimony are made only after careful consideration of the consequences and potential risks and with the best available advice.

### 3.4.1 — *Alienation of stable patrimony*

As was noted above, alienation is any transaction by which ownership of property is transferred from one person, physical or juridic, to another whether by sale or donation. Even if the transfer is to another part of the same institute or society or another church-related entity, transactions involving alienation are regulated by canon law when they involve property which has been legitimately designated to be part of the institute's or society's stable capital. For sales and donations of property from the stable capital whose value exceeds the limit amount set by the Holy See for the region in which the property is located, the written permission of the competent superior after having received the consent of his or her council as well as the permission of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life are required for the validity of the transactions. Diocesan right institutes and societies and autonomous monasteries also need the permission of the diocesan bishop of the place where they are located (c. 638 § 4). In the United States, the need for the permission of the Holy See is triggered when the value of the property to be alienated exceeds \$5,705,000 US for property located in dioceses whose Catholic population is less than 500,000 and \$11,408,800 US for property located in dioceses whose Catholic population exceeds 500,000;<sup>71</sup> in Canada, this permission is required if the value of the property to be alienated exceeds \$5,745,931CDN<sup>72</sup> (c. 634 § 3). Permission of the Holy See as well as compliance with any applicable civil laws is also required for the alienation of so-called "precious items," that is, property valuable for artistic or historic reasons regardless of its monetary value<sup>73</sup> (c. 1269). Perhaps wary of lawsuits that have attempted to engage

<sup>71</sup> CICLSAL, letter, 3 June 2015, in THE RESOURCE CENTER FOR RELIGIOUS INSTITUTES, "Alienation and Adverse Business Practices Limits," <https://www.trcri.org/page/alienation>.

<sup>72</sup> CANADIAN CONFERENCE OF CATHOLIC BISHOPS, decree n. 38 (2020), in *Canadian Canon Law Society Newsletter*, 52 (Spring 2020), 42. It is the practice of the Holy See to set the upper limit for institutes and societies in Canada at the amounts set by the episcopal conference, see JOHN RENKEN, *Church Property: A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, Staten Island, NY, Saint Paul's, 2009, 259, n. 38.

<sup>73</sup> *Economy*, §82, 113. Also subject to this stricture are votive donations. *Economy* seems to overreach in claiming that sacred objects, i.e., "those designated for divine worship by dedication or blessing" (c. 1171), "if they belong to a public ecclesiastical juridic person, can be acquired only by another ecclesiastical juridic person." The instruction cites canon



the Holy See as a party for claims against dioceses and religious institutes, *Economy at the Service of the Charism and Mission* attempts to explain what this permission of the Holy See for transactions by institutes and societies does and does not entail. The Congregation “issues the permission without, however, assuming any economic responsibilities. The permission guarantees that the transaction *is congruent with the purposes of the ecclesiastical patrimony*. The delegated responsibility of this intervention is based exclusively on the appropriate exercise of the power of the Church. The permission, therefore, is not an *act of patrimonial domination, but rather of administrative authority* aimed at guaranteeing the good use of the assets of public juridical persons in the Church.”<sup>74</sup>

No explicit provision in the Code of Canon Law addresses the establishment of a lower threshold specifically for religious institutes and societies of apostolic life that would prompt the need for permission of the competent superior with the consent of his or her council for alienations of property belonging to stable patrimony. Nor is the issue addressed in the two recent instructions from the Congregation. Canon 638 §3 states simply: “For the validity of alienation and of any other affair in which the patrimonial condition of a juridic person can worsen, the written permission of the competent superior with the consent of the council is required.” Taken literally, this norm would seem to require the permission of the superior with the consent of his or her council for any and all alienations touching on stable patrimony no matter how small. De Paolis has suggested that the proper law of institutes or societies should designate an amount that would prompt the need for internal permissions and consents.<sup>75</sup> However, unlike canon 638 §1 which explicitly calls for proper law to define which acts of superiors exceed the limits or ordinary administration, canon 638 §3 is silent about a role for proper law in regulating alienation from stable patrimony. Moreover, leaving the matter to proper law would result in institutes and societies in the same region having different, sometimes widely different, regulatory norms, something the Congregation has generally tried to avoid; and it would also result in international institutes and societies having the same limits everywhere despite vast discrepancies in economic conditions in the many places they operate.

1269 as authority for this claim, but the canon refers only to acquisition of sacred objects belonging to a public juridic person by prescription, not by other methods of legitimately transferring ownership.

<sup>74</sup> *Economy*, §57, 89-90. Emphasis in the original.

<sup>75</sup> Velasio DE PAOLIS, *I Beni temporali della Chiesa*, new ed., Bologna, Edizione Dehoniana Bologna, 2011, 262.

On the other hand, canon 635 § 1 stipulates: “Since the temporal goods of religious institutes are ecclesiastical, they are governed by the prescripts of Book V, *The Temporal Goods of the Church*, unless other provision is expressly made.”<sup>76</sup> Canon 1292 § 1 in Book V authorizes episcopal conferences to establish for their regions a lower amount that prompts the need for permission from the authorities specified in the statutes of juridic persons not subject to any diocesan bishop when they propose to alienate property belonging to the institute’s or society’s stable patrimony. Unlike canon 638 § 3 which reserves to the Holy See the authority to set the upper limit for acts of alienation by institutes and societies, no explicit norm of the Code exempts religious institutes and societies of apostolic life from observing this lower limit set by the conference for acts of alienation. Religious institutes and societies of apostolic life are generally not subject to norms issued by diocesan bishops individually or episcopal conferences collectively in their internal affairs, and the management of temporal goods is such an internal affair. Nevertheless, it has been the practice of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life to set the maximum value beyond which the permission of the Holy See is required for the validity of alienations for a nation or region in harmony with the upper threshold set by the episcopal conference of the territory.<sup>77</sup> Moreover, in at least one case, a complementary norm of an episcopal conference in matters related to temporal goods does bind religious institutes. In 2007, the United States Conference of Catholic Bishops enacted, and the Holy See granted *recognitio* to, a norm on leasing of church property that applies even to religious institutes and societies of apostolic life of pontifical right.<sup>78</sup> Since there is no express provision of law that provides otherwise for religious institutes and societies of apostolic life, it would seem that they are bound by the lower limit set by the episcopal conference for juridic persons in their territory.<sup>79</sup> In the United States, this lower limit at this writing would be \$250,000 for property in dioceses with Catholic populations below \$500,000

<sup>76</sup> Canons 718 and 741 extend the norms of Book V to the temporal goods of, respectively, secular institutes and societies of apostolic life.

<sup>77</sup> *Economy*, §57, 90: “It is the Dicastery’s practice to be guided by the maximum amount set by the Episcopal Conferences for the individual regions.”

<sup>78</sup> USCCB, complementary norm Canon 1297, 8 June 2007: <http://www.usccb.org.norms/1297.htm>: “4. The valid leasing of goods owned by a pontifical institute of consecrated life or society of apostolic life requires, in addition to the consent of the competent major superior and council, the *nihil obstat* of the diocesan bishop when the market value of the property to be leased exceeds \$1,000,000 or the lease is to be for 3 years or longer. 5. The valid leasing of ecclesiastical goods belonging to any public juridic person requires the consent of the Holy See when the market value of the goods exceeds \$5,000,000.”

<sup>79</sup> Robert T. KENNEDY, Commentary on Canon 1292, in CLSA *Comm2*, 1497, n. 145 (= KENNEDY).

US and \$750,000 US for property in dioceses with a Catholic population in excess of 500,000;<sup>80</sup> in Canada, it would be \$574,593 CDN (10% of the maximum amount).<sup>81</sup>

*Economy at the Service of the Charism and Ministry* adds several clarifications to its praxis with regard to the alienation of church property by institutes and societies. First, it holds that the formalities for alienation, including the requirement of the permission of the Congregation, must be observed for the validity of the transaction in all sales of real estate by institutes and societies, “regardless of whether the goods are ascribed or not to the stable patrimony.”<sup>82</sup> Second, the formalities for alienation apply not only to the sale of property but also “to contracts for the exchange of goods [and] for donations even when they involve other public legal entities.”<sup>83</sup> Third, when requesting permission from the Holy See for the alienation of property, the superior of institutes and societies of pontifical right should include, in addition to the usual documentation, “the opinion of the ordinary of the place where the property is located, or for the institutes of diocesan right and the monasteries *sui iuris*, the consent of the ordinary of the place where the property is located.”<sup>84</sup> Fourth, the Congregation made explicit several conditions that it is accustomed to require before it grants permission for alienations of property or other transactions affecting the stable patrimony: the Congregation “can not grant permission for financial proposals should audited [financial] statements not be provided.”<sup>85</sup> Nor is the Congregation inclined to “authorize sales aimed at subsidizing immediate financial needs without examining the causes” and receiving plans for remedying the situation<sup>86</sup> or those aimed at repaying debts without a financial rehabilitation plan.<sup>87</sup>

### 3.4.2 — *Transactions that can adversely affect the patrimonial condition*

Canon 1295 extends the formalities required for alienation to transactions which do not in themselves involve the transfer of ownership of property but which “can worsen the patrimonial condition of the juridic person.” Although what transactions threaten the financial stability of a juridic person will usually

<sup>80</sup> UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, complementary norm 1292, 31 March 2010, <http://www.usccb.org/norms/1292.htm>.

<sup>81</sup> CANADIAN CONFERENCE OF CATHOLIC BISHOPS, decree 38 (2020), 42.

<sup>82</sup> *Economy*, §81, 110-111.

<sup>83</sup> *Economy*, §81, 111.

<sup>84</sup> *Economy*, §81, 111.

<sup>85</sup> *Guidelines*, §1.3, 14.

<sup>86</sup> *Economy*, §83, 112.

<sup>87</sup> *Economy*, §83, 112.

depend on the financial condition of that entity, commentators suggest that such transactions often include “mortgaging real property or pledging valuable items of personal property as collateral for a loan, granting easements, licenses, liens, or options to purchase, contracting to pay annuities, making unsecured loans, acting as guarantor or surety, transferring operational control of one’s assets while retaining ownership, and incurring debts even if unsecured by collateral.”<sup>88</sup> *Economy at the Service of Charism and Mission* does not explicitly address the sort of transactions that might worsen the patrimonial condition of an institute or society, but it does implicitly include among such transactions various forms of incurring indebtedness if the amount borrowed exceeds the maximum sum established for the region for the alienation of property. Thus, while purchasing real estate and constructing or renovating buildings are classified as always being acts of extraordinary administration for superiors, they become the transactions of canon 1295 requiring the permission of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life “where the institute of consecrated life or society of apostolic life would need to resort to credit for financing the operation in an amount that exceeds the maximum sum provided for each individual region.”<sup>89</sup> By requiring that “proper law should establish the procedures for *validly* contracting mortgages, debts, securities,” the instruction seems to implicitly categorize these transactions as *per se* acts of extraordinary administration for superiors.<sup>90</sup> In addition, if the indebtedness incurred reaches a sufficient amount, it is treated as a transaction subject to canon 1295: “When the amount of the financial transaction [for financing through indebtedness] exceeds the maximum amount set for the individual Regions, the authorization of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life is required.”<sup>91</sup> When an institute or society proposes to incur indebtedness in excess, depending on the size of the diocese, of \$5,705,000 US or \$11,408,000 US in the United States or of \$5,745,931 CDN in Canada, it seems reasonable to say that it is taking an action that can adversely affect its patrimonial condition.

### 3.4.3 — *Leasing church property*

*Economy at the Service of the Charism and Mission* offers some practical guidance to institutes and societies on the leasing of church property. Before leasing property, they should evaluate the potential tenant and ensure that the

<sup>88</sup> Kennedy, 1502.

<sup>89</sup> *Economy*, §78, 106.

<sup>90</sup> *Economy*, §87, 117. Emphasis added.

<sup>91</sup> *Economy*, §88, 119.

use of the property to be leased is compatible with the charism and mission of the institute or society. Moreover, care should be taken to ensure that the property to be leased is suitable for the proposed use by the lessee. The lessor should also retain the right to approve any changes in the use of the property during the course of the lease.<sup>92</sup>

Canon 1297 of the Code of Canon Law entrusts the task of regulating the leasing of church property to the episcopal conference of a territory. These complementary norms bind religious institutes and societies of apostolic life. In the United States, institutes and societies of pontifical right must receive the *nihil obstat* of the diocesan bishop of the place where the property is located for the valid leasing of property when the value exceeds \$1 million US or the lease is for more than three years and must seek the consent of the Holy See if the market value of the property to be leased exceeds \$5 million US.<sup>93</sup> In Canada, leasing of church property for over two years is an act of extraordinary administration. The written consent of the major superior is also required for leases without charge to charitable organization when the lease is for more than three months. Permission of the Holy See is required for leases of property whose value exceeds the maximum amount set for alienation by the Holy See or the lease if for more than nine years.<sup>94</sup>

*Economy at the Service of the Charism and Mission* does not mention canon 1297 or episcopal conference norms on leasing. It does, however, offer a norm on leasing which it extends beyond leases in the proper sense to include loans of property, ceding of right over land, providing housing, and granting usufruct: "should the value of the transaction exceed the maximum amount set for the individual regions *and* the contract has a duration of over six years, one must seek the authorization of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life."<sup>95</sup> This new norm from the Congregation is not entirely compatible with the current legislation on leasing from episcopal conferences in the United States and Canada. The complementary norm for the United States requires the permission of the Holy See when the value of the property to be leased exceeds \$5 million US no matter what the length of the lease whereas, according to the instruction, the permission of the Holy See would only be required if the value of the property to be leased exceeded, depending on

<sup>92</sup> *Economy*, §76, 106.

<sup>93</sup> USCCB, complementary norm Canon 1297 §5, 8 June 2007: <http://www.usccb.org/norms/1297.htm>.

<sup>94</sup> CANADIAN CONFERENCE OF CATHOLIC BISHOPS, decree n. 333, 28 June 1989.

<sup>95</sup> *Economy*, §78, 107. Emphasis added.

the whether the Catholic population in which it is located is less than or greater than 500,000, \$5,705,000 US or \$11,408,000 US and the lease is for longer than six years. Like the instruction, the Canadian Conference's norm uses the maximum sum established for alienation in the territory as the criterion for determining whether the permission of the Holy See is needed for a lease. However, unlike the instruction, the Canadian norm requires such permission regardless of the length of the lease. Moreover, the Canadian norm requires the permission of the Holy See for leases in excess of nine years no matter what the value of the property to be leased, whereas the instruction limits the requirement to situations where both of two conditions are met: the value of the property to be leased exceeds the maximum amount for the territory and the term of the lease is more than six years. Since *Economy in the Service of the Charism and Mission* is in the nature of an instruction, it must be in conformity with the law. "The ordinances of instruction do not derogate from laws. If these ordinances cannot be reconciled with the prescripts of laws, they lack all force" (c. 34 § 2). Since the provisions of the instruction cannot be reconciled with the applicable particular law, it would seem that its provision for leasing lack force in the United States and Canada.

### *Conclusion*

The Congregation for Institutes of Consecrated Life and Societies of Apostolic Life's 2014 Guidelines and 2018 document *Economy in the Service of the Charism and Ministry* charge institutes and societies to undertake a searching and honest assessment of themselves and their institutional apostolates to determine how their founding charisms can be reinvigorated in the midst of changed internal conditions and the challenges of the modern economic situation. To guide this communal reflection, the Congregation suggests four principles from Pope Francis' 2013 apostolic exhortation *Evangelii gaudium*.

1. *Time is greater than space.*<sup>96</sup> While religious institutes can be justly proud of the apostolic and charitable works they have initiated and sustained in the course of their histories, it is easy to forget that, at their origins, these works were new and creative responses to the needs and

<sup>96</sup> Pope FRANCIS, apostolic exhortation *Evangelii gaudium*, §221, 24 November 2013, in AAS, 105 (2013), 1111; trans. in *Economy*, §46, 76 (= *Evangelii gaudium*). Emphasis in the original.

challenges of their time. As a result, time and energy may be expended exclusively maintaining the institutions rather than on discerning how the charism is calling institutes and societies to respond to the pressing needs of the present day. However, Pope Francis has cautioned: “For many years we have been tempted to believe, and many have grown up with the idea, that religious families should occupy spaces rather than start processes, and this is the temptation. We have to start processes, not occupy spaces.”<sup>97</sup>

2. *Reality is more important than the idea.*<sup>98</sup> Institutes and societies and their multiple apostolic works require careful planning and husbanding of resources. However, they came about as charismatic responses to concrete needs of suffering people, and they retain their true rationale only if they remain faithful to that founding impulse. Plans and structures are necessary, but they remain at the service of charismatic outreach. As Pope Francis explains, “Today, reality challenges us—I repeat—reality invites us to be a bit of yeast, a little pinch of salt ... a blessed minority which is invited again to leaven, to raise in harmony with what the Spirit has inspired in the hearts of your founder and in your own hearts. This is what it takes today.”<sup>99</sup>
3. *The whole is superior to the part.*<sup>100</sup> Institutes and societies need to avoid becoming inward-looking and preoccupied with their own survival as if the Church and the world revolved around them and their needs. One of the gifts of consecrated life in its concrete realizations is to expand the horizons of the local churches in which it is embedded and prevent them from becoming parochial in the pejorative sense of that term. On the other hand, by immersion in the life and struggles of the various local churches where they exercise their charism and mission, they can “avoid falling into the temptation that the part (our small part or vision of the world) may be superior to the ecclesial whole.”<sup>101</sup>

<sup>97</sup> Pope FRANCIS, allocution “In visitatione pastorali in Archdioecesi Mediolanensi cum sacerdotibus et viris mulieribusque consecratis in templo Cathedrali,” 25 March 2017, in AAS, 109 (2017), 380 (= FRANCIS, allocution “In visitatione pastorali”); trans. in *Economy*, §46, 76.

<sup>98</sup> *Evangelii gaudium*, §230, 1113; trans. in *Economy*, §47, 77. Emphasis in the original.

<sup>99</sup> Francis, allocution “In visitatione pastorali,” 380-381; trans. in *Economy*, §47, 77.

<sup>100</sup> *Evangelii gaudium*, §233, 1115; trans. in *Economy*, §48, 79. Emphasis in the original.

<sup>101</sup> FRANCIS, allocution “In visitatione pastorali,” 380; trans. in *Economy*, §48, 80. Emphasis in the original.

4. *Unity prevails over conflict, diversity.*<sup>102</sup> In a polarized world, institutes of consecrated life and societies of apostolic life and their works cannot avoid conflicts. Nevertheless, they “are called to accept conflicts, willing to get [their] hands dirty in addressing them without being trapped by them, so as to transform them into new processes that provide for community, even with its inherent differences, which must be accepted as such.”<sup>103</sup>

These four principles, recently articulated by Pope Francis, aptly characterize the approach to teaching, interpreting, and applying canon law exemplified by Father Francis Morissey throughout his long and distinguished career.

<sup>102</sup> *Evangelii gaudium*, §225, 1112; trans. in *Economy*, §49, 80.

<sup>103</sup> *Economy*, §49, 80.



***SALUS ANIMARUM***  
**SOME EXAMPLES OF THE ADMINISTRATION  
OF VIATICUM TO PLAGUE VICTIMS  
IN THE POST-TRIDENTINE PERIOD**

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**SUMMARY** — Times of crisis have always provided opportunities for the Church to revisit and revise her canonical and liturgical discipline, whether by permanently altering her laws, or in the temporary cessation or introduction of certain practices better suited to the particularities of the circumstances. This is no less so when such crises arise from serious sickness, and the history of the Church's legislation governing sacramental and liturgical acts is replete with examples. In this essay, the A. considers the contributions of Saint Charles Borromeo, Saint Alphonsus Liguori, and Prospero Lambertini's *De Synodo dioecesana*, particularly concerning the administration of Holy Communion to those suffering from infectious or contagious disease.

**RÉSUMÉ** — Les périodes de crise ont toujours fourni à l'Église l'occasion de revoir et de réviser sa discipline canonique et liturgique, que ce soit par une modification permanente de ses lois, ou par la cessation temporaire ou l'introduction de certaines pratiques mieux adaptées aux particularités des circonstances. Il n'en est pas moins vrai lorsque de telles crises découlent de maladies graves, et l'histoire de la législation de l'Église régissant les actes sacramentels et liturgiques regorge d'exemples. Dans cet essai, l'A. considère les contributions de Saint Charles Borromée, de Saint Alphonse de Liguori et du *De Synodo dioecesana* de Prospero Lambertini, notamment en ce qui concerne l'administration de la Sainte Communion aux personnes souffrant de maladies infectieuses ou contagieuses.

The circumstances arising from the novel coronavirus, SARS-Cov-2, and the Covid-19 pandemic, have introduced into our common vocabulary a number of phrases that were hitherto unknown or rarely used, amongst them

‘social distancing’ and ‘the new normal.’<sup>1</sup> Another, ‘key worker,’ has been used to refer to healthcare and medical staff, those involved with the supply and provision of medical equipment and food and, as the pandemic has progressed, others too. One group of people is broadly omitted from this rightly celebrated clan, and they are conspicuous by their absence. Yet the crucial work they have undertaken has been carried out quietly and conscientiously from the first days of the outbreak, and without interruption.<sup>2</sup> I am, of course, thinking of the clergy; particularly the pastoral clergy working in parishes and communities, who have attended to the sick and dying, carried out visits to virus-ridden hospitals, hospices, and nursing homes, conducted funerals with few or even no mourners present, in some cases quarantining in small groups to make themselves available around the clock whilst keeping others safe, and often provided solace to distressed family members who lost loved ones as a result of the disease, sometimes with little more than the telephone or ubiquitous Zoom call to help them in their task.<sup>3</sup> A brief personal anecdote illustrates this point. At the start of the first lockdown in England, a friend of mine who is a priest in his seventies and who works as a hospital chaplain told me, quite frankly, that he expected to contract the virus and to die from it in the course of his duties. He is still with us, but his story is far from unusual, and the courage and sense of duty that was demonstrated by people such as him is truly worthy of our admiration and praise.

A cursory review of the pastoral activity of the clergy during the pandemic reveals the extraordinary extent of this effort. Clergy have responded

<sup>1</sup> This paper was originally delivered as part of the 2021 Winter Meeting of the Ecclesiastical History Society, *The Church in Sickness and in Health*, held online due to the restrictions of the Covid-19 pandemic on Saturday 16 January 2021.

On the use of accurate scientific and medical language surrounding the pandemic, and for a helpful glossary of terms, see Kathy KATELLA, ‘Our New Covid-19 Vocabulary—What Does It All Mean?’, 7 April 2020, *Yale Medicine*, online at <<https://www.yalemedicine.org/news/covid-19-glossary>>. The World Health Organization (WHO) declared COVID-19 as a pandemic on 11 March 2020. See Tedros ADHANOM, ‘WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19,’ 11 March 2020, *World Health Organization*, online at <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>.

<sup>2</sup> In particular, see the essays on liturgy and hygiene in relation to Covid-19 in a volume curated by liturgical and sacramental experts: Hans-Jürgen FEULNER and Elias HASLWANTER (eds.), *Gottesdienst auf eigene Gefahr? Worship at Your Own Risk? Die Feier der Liturgie in der Zeit von Covid-19*, Münster, Aschendorff, 2020.

<sup>3</sup> For some examples of this, see ARCHDIOCESE OF BOSTON, ‘Covid-19 Priest Team’, online at <<https://www.bostoncatholic.org/covid-19-priest-team?fid=4126>>; Elizabeth DIAS and Ryan Christopher JONES, ‘The Last Anointing’, 6 June 2020, *The New York Times*, online at <<https://www.nytimes.com/interactive/2020/06/06/us/coronavirus-priests-last-rites.html>>.

heroically to the unprecedented circumstances—another one of those phrases—unleashed on their parishes and communities by the virus. Many of these responses, particularly in their ingenuity and creativity, have been laudable. One thinks immediately of the seemingly endless live-streaming of services by clergy who perhaps did not know one end of a smart phone from the other nine months earlier; or the drive-up confessionals, seen particularly in the United States, set up during Holy Week in order to continue something of a normal pattern of liturgical and sacramental life despite the circumstances.

Amongst these efforts there have also been some responses that, although undertaken with undoubted sincerity, have been inevitably less edifying to observe. One thinks here of the suggestion to permit confessions to be heard by telephone, or the distribution of Holy Communion in envelopes for the faithful to receive in their own home.<sup>4</sup> I do not wish or need to attract undue attention to more examples here, but perhaps in the coming months and years the experience of the Church and her clergy during this intense period might be a useful point of departure for revisiting and potentially revising some of the protocols given for times of serious, widespread disease, and also for restating why the Church's discipline does and does not permit certain practices. Certainly, history tells us that it is precisely in times of extreme need that the Church adapts and forges her disciplines anew, often responding to a particularly difficult situation with what to the outsider can appear to be incredible alacrity and speed. And this is perhaps particularly so in respect of the sacraments and their liturgical celebration.

Indeed, there is much in the Church's present canon law in general and in everyday practice that is the result of exceptions or unusual circumstances. There are obvious historical reasons why we have laws, for instance, governing the lines of consanguinity for the valid and licit contracting of marriage, or why the Church's discipline has clear rules for the buying and selling of ecclesiastical goods, and so on. It is because, quite often at some point in the past, good principles needed to be enunciated and established in written laws, in order to avoid something that had already happened from happening again. The liturgical and sacramental discipline of the Church presented in the canon law, past and present, is no exception to this. It is an

<sup>4</sup> J.D. FLYNN and Ed CONDON, 'Confession by phone, Skype, or emoji? Could it happen during coronavirus pandemic?', *Catholic News Agency*, 18 March 2020, online at <<https://www.catholicnewsagency.com/news/confession-by-phone-skype-or-emoji-could-it-happen-during-coronavirus-pandemic-93488>>; KATHOLISCH.DE, 'Bistum verbietet Eucharistie "zum Mitnehmen"', 22 April 2020, online at <<https://www.katholisch.de/artikel/25258-bistum-verbietet-eucharistie-zum-mitnehmen>>.

area of the law replete with examples of where the normative pastoral practice of the Church may be set aside in a particular circumstance that requires a particular or specific intervention or approach.<sup>5</sup> It is some limited examples in the realm of the pastoral care of the sick that I will briefly review in this essay.

First, the title of this contribution is ‘*Salus Animarum*: Some Examples of The Administration of Viaticum to Plague Victims in the Post-Tridentine Period.’ By this phrase—*salus animarum*—I wish to locate what the Church has done historically, and continues to do presently, in her sacramental and liturgical discipline, in the loftiest of categories. The Catholic Church speaks of the *salus animarum*, the salvation of souls, as her supreme law: *salus animarum suprema lex*.<sup>6</sup> The maxim entered the ecclesiastical or canonical legal system from the Roman law, and more precisely from Cicero in his treatise on laws, *De legibus*, where it is used to describe the responsibilities of the magistrates toward the people, and given as *ollis salus populi suprema lex esto*.<sup>7</sup> The word *salus* has a twofold meaning, drawn out in the English words ‘salvation,’ ‘salutary,’ ‘salve,’ and so on. So *salus* refers to the kind of wellbeing that goes beyond physical healing. In the Roman law, it meant a general wellbeing or happiness, human contentment. In the Christian context, this wellbeing or happiness necessarily points beyond the contentment of this world to beatitude, to the happiness of the world to come, and so moves our understanding of the word into the supernatural realm. Here we are therefore speaking not just of the health, wellbeing, or salvation of bodies, but of souls: the *salus animarum*. In the context of the pastoral care of the sick, this is a phrase helpfully rich with meaning. But how precisely does

<sup>5</sup> For instance, the rite for the administration of the sick in the present Roman Ritual provides that “[sick] people who are unable to receive communion under the form of bread may receive it under the form of wine alone.” *Pastoral Care of the Sick. Rites of Anointing and Viaticum. Approved for Use in the Dioceses of the United States of America by the National Conference of Catholic Bishops and Confirmed by the Apostolic See*, New Jersey, Catholic Book Publishing Corporation, 1983, 59. Cf. *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, Vatican City, Libreria Editrice Vaticana, 1983, c. 925: ‘Sacra communio conferatur sub sola specie panis aut, ad normam legum liturgicarum, sub utraque specie; in casu autem necessitatis, etiam sub sola specie vini.’ English translation from *Code of Canon Law. Latin-English Edition: New English Translation*, Washington, DC, CLSA, 2012. All subsequent English translations from this code will be taken from this source unless otherwise indicated. Hereafter the 1983 Code of Canon Law will be referred to as *CIC* and canons by the abbreviation ‘c.’

<sup>6</sup> Canon 1752. In causis translationis applicentur praescripta canonis 1747, servata aequitate canonica et prae oculis habita salute animarum, quae in Ecclesia suprema semper lex esse debet.

<sup>7</sup> Marcus Tullius CICERO, *De legibus*, Liber Tertius, III, 8.

the Church make good on this in the realm of her sacramental and liturgical discipline, and how can an eye to the development of certain practices over the course of her history not only demonstrate this fundamentally pastoral concern, but also inform and provide a model for current praxis and, perhaps, even for future renewal?

The arc and range of the Church's current liturgical-sacramental discipline is vast, and the historical development of these laws and principles even more so. So I will necessarily limit myself here to just one of the seven sacraments, namely the Most Holy Eucharist. I do so not just because of the demands of space and time, but also because of the unique place of this sacrament in the life of the Church. Here I do not mean simply its indisputable importance in ecclesiastical polity, but rather that this sacrament is a repeatable sacrament, and still more it is one that we find regularly and frequently in both ordinary and extraordinary circumstances. In other words, whilst some of the sacraments are immediately and especially thought of as appropriate primarily in times of sickness and of death—particularly the anointing of the sick or extreme unction, and to a lesser extent the sacrament of penance or confession—the Most Holy Eucharist is an everyday, if not ever mundane, reality. Whilst the liturgical celebration of the anointing of the sick is usually reserved to circumstances *in extremis*, and hence the traditional description of the sacrament as 'extreme unction,' the Most Holy Eucharist, whether celebrated in the Mass, or present in liturgical or extra-liturgical devotions, or in Holy Communion, is found in the normal course of events of a parish community. For this reason, the particular provisions for this sacrament in times of serious sickness hold a special interest and importance.

In what follows, then, I will combine these broadly theological insights into this particular sacrament with the general theme with which I began, and which I propose as the basic premise of my essay, namely that in the celebration and administration of the sacraments in time of serious need, and particularly in time of sickness or contagion, plague or pandemic, the Church's principal concern has always and consistently been the continuity of her sacramental-liturgical life, which is carried out in the first place for the glory of God and, in the second place, but no less importantly, for the sanctification and edification of the Christian faithful.

In discussing the Most Holy Eucharist here, I adopt a broad, classical distinction. The sacrament may be considered first in its preparation, that is the offering of the Mass; secondly, in its completed state, that is the Body and Blood of Christ under the species of bread and wine, namely the Blessed Sacrament; thirdly, in its reception under the species of bread and wine by

the communicant, that is in Holy Communion.<sup>8</sup> It is this third category that I will address, by discussing the various modes for the distribution of Holy Communion in circumstances of extreme sickness. The rite for the distribution of the Most Holy Eucharist is called Holy Communion and, in the case of a person who is in danger of death, the administration of Holy Communion together with certain other ritual acts is known as Viaticum, which is a part of the so-called Last Rites.

The Church has historically gone to great lengths in the administration of this sacrament in times of serious need, to ensure that the would-be recipient may still receive the grace of the sacraments, whilst at the same time seeking to ensure that the liturgical act of administering the sacrament neither presents physical danger to the recipient, nor undue risk to the attending minister, nor any reasonable chance of the profanation of the sacramental species itself. These concerns flow from the nature of the liturgical-sacramental act: one that is carried out for the glory of God and the sanctification and edification of the faithful. To demonstrate how this has been achieved over the course of history, it is helpful to look at some of the specific provisions of the distribution of Holy Communion *in extremis*.

As is well known, the normative minister of Holy Communion in the Latin Church today is any deacon, presbyter, or bishop, who is referred to in the law as the ordinary minister (c. 900 § 1). A distinction is to be made here between the ordinary minister of Holy Communion, who (as we have just noted) may be a deacon, presbyter, or bishop, and the minister who is able to confect the Most Holy Eucharist, who is alone a validly ordained priest or bishop (*sacerdos*, c. 910 § 1). In the Latin Church, the general discipline for receiving Holy Communion from this minister continues to be under the species of bread alone, the Host being placed directly on the tongue of the communicant, whose own posture is kneeling. This is achieved by the minister, whether ordinary or extraordinary, taking the consecrated Host into his own hand, and placing it on the tongue of the communicant, whilst reciting the formula provided in the liturgical books, and where instructed also making the sign of the cross over the communicant with the Host. At various times, albeit in a limited range of circumstances, this means of distributing Holy Communion has been adapted. In our own day, it is not unusual to see Holy Communion distributed by a non-ordained, extraordinary minister, and for the communicant to receive Holy Communion either standing or kneeling, on the tongue or directly in the hand, and even under both kinds; that is, under the form of bread and under the form of wine, drunk directly from

<sup>8</sup> Dominic PRUMMER, *Handbook of Moral Theology*, Cork, The Mercier Press, 1956, 265.

the chalice. From an historical perspective, in the Latin Church these more recent adaptations must be seen as a change from the practice adopted almost uniformly across the Church for the previous thousand years or so. Yet, even given this universal approach for so many years, exceptions are found, and particularly when it comes to administering Holy Communion to the seriously ill, and most especially to those suffering from an infectious or contagious disease. These exceptions are illustrative of the Church's desire to care for those suffering from ill health, and they are an implicit recognition of the inherent value of the sacraments and the grace which they impart.

I want now to introduce some examples of this from the early modern period, a time of great significance in the development of the Church's liturgical life, even in the context of today. This period is often referred to in the history of the canon law (which includes the history also of rubrics and liturgical law) as the *ius novissimum*. It is a time that runs from the Council of Trent, ending in 1563, to the promulgation of the first Code of Canon Law by Pope Benedict XV in 1917.<sup>9</sup> It is a period that is perhaps most strongly characterized by the drawing together of the juridical, moral, and liturgical disciplines of the Church into a more coherent unity. For this reason, it is a particularly rewarding area for study.

Amongst the most significant and well known figures of this period was Cardinal Carlo Borromeo, Archbishop of Milan for twenty years from 1564 until his death in 1584. Borromeo was responsible for convening no fewer than six provincial councils during his tenure in Milan.<sup>10</sup> In 1579, after terrible casualties resulting from an outbreak of plague, Cardinal Borromeo held his Fifth Provincial Council. The acts of the council dealt extensively with the pastoral care of the sick and dying in time of plague; it was there, and in that context, that he addressed certain questions regarding the distribution of Holy Communion. Borromeo, who is known even today for his extraordinary pastoral care and personal holiness during the plague that ravaged his diocese, took a rather restrictive approach to this matter, and the influence of his writing has shaped subsequent practice and law. As we will see, some later authors suggested that the intrinsic importance of administering the sacrament implies that the usual rubrics should be somewhat relaxed, or at least reimaged, in time of contagious or infectious disease. Not so Cardinal Borromeo, who expressly forbade the alteration of the liturgical rite, even in such circumstances.

<sup>9</sup> *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Rome, Typis Polyglottis Vaticanis, 1917.

<sup>10</sup> Edward LANDON, *Manual of Councils of the Holy Catholick Church, Comprising the Substance of the Most Remarkable and Important Canons, Alphabetically Arranged*, London, Francis and John Rivington, 1846, 406-410.

In particular, Borromeo responded against the use of an instrument to aid with the distribution of Holy Communion to those suffering from the plague or other infectious sickness.<sup>11</sup> Such utensils, whether in the form of a spoon or *cochlear*, or pincers or forceps, used to hold or bear the consecrated Host and to place it into the mouth of the communicant, were deemed by Borromeo to be unnecessary despite the chance of infection or contagion.<sup>12</sup> The acts of the council over which he presided reflect this strong prohibition. “In every sacrament, and much more so in the administration of the Most Holy Eucharist, [the Priest] will take care to avoid danger or scandal, lest he introduce even the slightest novelty into the rite of administration; let him use no instrument, nor anything similar in place of his fingers.”<sup>13</sup>

This concern for scandal, whether in the form of potential *admiratio* arising from the act, or the risk of the profanation of the sacred species itself, was for Borromeo principally a moral matter. It is unsurprising, then, that it is similarly addressed by perhaps the most influential moralist of the period, Alphonsus Liguori (1696-1787). Saint Alphonsus, author of the nine-volume work *Theologia moralis*, sided with Borromeo on this point. He wrote: “It is not permitted [even] in time of plague to give Holy Communion with some kind of instrument (much less to do so in another dish that is taken by the patient himself).”<sup>14</sup> Liguori even identified and named the kind of dish or instrument to which he referred: a Eucharistic spoon or *cochlear*. And he cautioned against its use once more out of fear of causing scandal amongst the faithful, and because of the risk of the Most Blessed Sacrament falling to the ground and thereby being profaned.<sup>15</sup>

<sup>11</sup> On the question of the use of an instrument in another sacrament, namely the Anointing of the Sick, see James BRADLEY, “Extreme Unction in Extreme Times: The Use of an Instrument in the Anointing of the Sick,” in Hans-Jürgen FEULNER and Elias HASLWANTER (eds.), *Gottesdienst auf eigene Gefahr? Worship at Your Own Risk? Die Feier der Liturgie in der Zeit von Covid-19*, Münster, Aschendorff, 2020, 589-599.

<sup>12</sup> For some examples of these, see Lucas VIAR, ‘Eucharistic Utensils’, *Liturgical Arts Journal*, 6 April 2020, online at <<https://www.liturgicalartsjournal.com/2020/04/eucharistic-utensils.html>>.

<sup>13</sup> Carlo BORROMEO, *Acta Ecclesiae Mediolanensis a Sancto Carolo*, Tomus I, Milan, Edente Paulo Pagnonio, 1843, 247. “At vero in omni Sacramento, multoque magis in SS. Eucharistia ministranda cavebit, ut evitandi periculi vel suspicionis causa, ne quid vel minimum quod novum sit, ad ministrationis ritum introducat; neve instrumentum, aliudve quid simile ad ministrationem pro digitis vel adeo in iis ipsis adhibeat.” Translation by the author.

<sup>14</sup> Alphonsus LIGUORI, *Theologiae moralis*, Volume VIII, Turin, Hyacinthi Marietti, 1828, 86. “Non licet tempore pestis porrigere eucharistiam medio aliquo instrumento (multo minus deponere alicui in scutella, ut ab ipsomet aegro sumatur), sed manu danda est, ut docet Bon. d. 4. q. 5. p. 2. ex Suar. et aliis.” Translation by the author.

<sup>15</sup> LIGUORI, *Theologiae Moralis*, Volume VIII, 86: “Quamvis Possev. c. 8. non improbabiler dicat, posse, praeciso scandalo, et periculo lapsus in terram, instrumento ad id rite confecto dari.”



Writing around the same time, in his own work *De Synodo dioeclesana*, Prospero Lambertini (1675-1758), later Pope Benedict XIV, also addressed this question, drawing on Borromeo's own example. Lambertini is a significant figure not just because of the high office he would go on to hold as pope, but because it is in his writings that precisely the synthesis characteristic of this period of the development and study of the canon law is to be found. Born in Bologna, Lambertini took doctorates in theology and *utriusque iuris*, that is, in both civil and canon law. His interest in the sacred liturgy was also extraordinary, and both in his legislation on sacred music, and in his involvement in and engagement with the Chinese Rites controversy as well as in the rites of the Oriental Catholic Churches, he demonstrated an unusual knowledge and sensitivity to the juridical, moral, and liturgical considerations applicable to each situation.<sup>16</sup> On this particular subject, Lambertini wrote in his *De Synodo dioeclesana*, as follows:

Finally, we must say something about the administration of two sacraments: the Eucharist and extreme unction. On this matter, if you will allow, we may turn to the witness borne by Saint Charles Borromeo, both by his heroic zeal in perfection, and by his response, made without any difficulty, drawing on common law [(*lege*)] and obligation [...]: without any doubt, both of these sacraments which are given to those in good health are quite clearly to be administered to the faithful seized by the plague. Thus Saint Charles rules on the matter, and guarantees as much in his fifth provincial council.<sup>17</sup>

At first, for Lambertini, together with both Borromeo and Liguori, the importance of the reverent administration of the sacrament remained paramount. There is little initial indication in favour of any relaxation of the rubrics permitting, for instance, the use of an instrument to assist with the distribution of Holy Communion to the sick in times of contagion. Instead,

<sup>16</sup> For instance, on the significant contribution of Benedict XIV to sacred music, see Uwe Michael LANG, "Theological Criteria for Sacred Music: From John XXII to Benedict XIV," in Janet E. RUTHERFORD (ed.), *Benedict XVI and Beauty in Sacred Music: Proceedings of the Third Fota International Liturgical Conference, 2010*, Dublin, Four Courts Press, 2012, 41-59.

<sup>17</sup> BENEDICT XIV, *De Synodo dioeclesana. Libri Tredecim in duos tomos distributi. editio novissima. Tomus secundus*, Bassano del Grappa, Remondini, 1767 (= *De Syn. Dioec.*), XIII, xix, n. 20. "Differendum tandem superest de administratione duorum Sacramentorum, Eucharistiae, & extremae Unctionis. Qua in re si sustineri tuto potuisset, quaecumque a S. Carolo Borromaeo gesta fuerunt, non tam ab illius heroicae perfectionis studio, quam a communi lege, & obligatione profluxisse, facile omnino fuisset ad propositum a Vicario Apostolico Juliae Caesareae postulatum respondere: nimirum duo ulla Sacramenta fidelibus peste correptis eadem plane ratione ministranda esse, qua bene valentibus administrantur; ita enim se praestitit S. Carolus, atque ita quoque cavit in suo quinto Provinciali Concilio." I am indebted to Sean Pilcher for his assistance with the translations of *De Synodo Dioeclesana* for this paper.

Lambertini's concern was that the faithful who had contracted an infectious disease, in this case the plague, should not be left without the sacraments but rather be afforded the same treatment and pastoral solicitude as others. This prescind from the underlying principle I offered at the start of this contribution: that these are not principally practical but rather supernatural concerns, relating in the end to the salvation of souls.

Yet despite agreeing with earlier authors on this point, Lambertini did not adopt wholesale the approach of Borromeo and Liguori. Indeed, he went on to discuss the liturgical and canonical practicalities that arise from this moral principle at some length, leaning on the writings of both Francisco Suárez and Saint Thomas Aquinas, as well as a number of historical examples and analogies. In this Lambertini took the moral argument that if, because of their supernatural value, a person should receive the sacraments even in circumstances of extreme sickness, contagion, or infection, then there must surely be a reasonable means of achieving this end. Again, in this discussion he provides a synthesis, both certain and sensitive, of the moral, liturgical, and juridical considerations at play.

In his writings, Lambertini pondered in particular the question of whether a person might receive Holy Communion in the hand, given the chance of infection or contagion arising from the spread of plague or other disease if he or she were to receive Holy Communion in the usual manner from a priest. At this time, we should recall, Holy Communion in the hand was completely forbidden in the Latin Church (apart from amongst priests and bishops in the celebration of the Mass), and this remained the case until much more recently. But Lambertini nevertheless discussed the moral implications, drawing on historical exceptions to the norm in order to argue that, in certain, specific and limited circumstances, the consecrated Host might in fact be received in the hand, even if, in the case of women, it should be placed on a cloth overlaying the hands of the communicant.<sup>18</sup>

Given its significance and deviation from the normative practice of the time, his contribution on this point is worth repeating in full.

Over the years the laity have received the Eucharist thus: men in their bare hands, and women on a small white cloth. If nothing else precludes this custom [(*mos*)], it may be continued, and revived again, but only in certain times of need, not too frequently, and when a plague rages, to more freely

<sup>18</sup> *De Syn. Dioec.* XIII, xix, n. 27. "At quidquid, sit de erudita hac controversia, illud certum est, per plura secula laicos, qui sacra Communionem reficiebantur, in proprias manus excepisse Eucharistiam, suisque itidem manibus illam in os intulisse; foeminas vero Eucharistiam suscepisse in album pannulum, eandemque subinde suis et ipsas manibus ad os intulisse."

guarantee the administration of holy Viaticum to the sick and dying. And so it is fitting that the Bishop, having consulted with experts, either [in time of] fear or danger of death, may permit some other means of administration, granting a faculty [so] that those who are refreshed with the sacred Body of Christ might take the sacred particle with their own hands, and place it in their mouth. It must surely be out of the question that those in proximate danger of death risk departing from this life without Viaticum.<sup>19</sup>

From these rather authoritative authors—saints, doctors of the Church, and popes—we can now also finally see how this thought was received by the rubricists, those commentators who sought not to provide the law or moral teaching *per se*, but rather to describe and explain how the principles established in the law and in the writings of authors such as those we have observed might actually be implemented by clergy and others, as it were, in the breach. I will limit myself here to a single, brief example of this, but one which I think demonstrates well the need for such commentary to come more properly from those truly expert in both legal and liturgical disciplines.

The conventual Franciscan and parish priest of San Salvatore in Onda, Antonio Brandimarte (1773-1838), was a well-beloved Italian cleric of the late eighteenth and early nineteenth centuries. In his *Modo pratico di assistere a'moribondi*, or practical guide for assisting the dying, he discussed the practical considerations for the administration of Communion in the form of Viaticum, drawing heavily on earlier authors.<sup>20</sup> Brandimarte attempted to provide a balance between the desire that the sick person should receive Holy Communion, demonstrated chiefly by Lambertini but also by others, and the

<sup>19</sup> *De Syn. Dioec.* XIII, xix, n. 27: 'Ideoque, si nullo expresso praecepto cavetur, ut, dum laici sacrae Communionis participes fiunt, alia sit ministrantis, alia vero suscipientis persona; si pluribus labentibus seculis Eucharistiam acceperunt laici, viri quidem in nudas manus, mulieres autem in album pannulum; si huic rei nil aliud obiicitur, quam subsecutus contrarius usus; neque modo contenditur, ut, hoc sublato, mos ille vetustior universim reintegratur, sed tantummodo ut certo, nec ita frequenti casu, saevientis scilicet pestis, ad faciliorem & expeditiorem reddendam ministrationem sacri Viatici, miseris moribundis exhibendi, remoto simul a ministris, quantum fas est, oppetendae mortis timore, ac periculo, possit Episcopus, adhibitis in consilium sapientibus viris, modum aliquem, aptamque ejusmodi ministrationis rationem permittere, quamvis ei iuncta esset implicita veluti facultas, ut is, qui sacro Christi Corpore reficitur, suis ipse manibus sacram Particulam apprehendat, atque in os suum inferat: magnis profecto animis opus est, ut tam aequa, tam proficua moderatio improbetur, ac reiiciatur, miseros aegrotos eo calamitatis adigendo, ut proximum incurrant periculum ex hac vita decedendi sine Viatico: quemadmodum animadvertit Pontas *verb. Communio cas.* 18. subditque etiam Muratorius loco supra citato.'

<sup>20</sup> Antonio BRANDIMARTE, *Modo pratico di assistere a'moribondi di dirigerli nel fare il testamento di amministrare loro i Sacramenti e di aiutare a ben morire i giustiziati*, Rome, Stamperia del Mordacchini, 1818; see especially pp. 72-84. Translations of this work given here are by the author.

equally present concern for the potential for irreverence toward the sacramental species. In particular, Brandimarte seems to have been preoccupied with the issue of the practical ability or inability of the sick person to reverently consume the Host, given the nature of certain illnesses or conditions. For instance, he warned: “Viaticum should not be given to a sick person who is afflicted with a cough or with vomiting if there is danger of irreverence.”<sup>21</sup> He further suggested that if it is likely that the sick person would be unable to properly consume the Host, “You could test with some food, and if you see that after half an hour [all is well], you could communicate them.”<sup>22</sup> He continued that, if it is not possible for sick persons to swallow the Host by itself, then it may even be given “as it would be in broth ... so that they do not remain in danger of death without the Eucharist.”<sup>23</sup>

In fact, these initial practical suggestions do not seem too far removed from good pastoral practice, even if their description appears to the modern reader to be somewhat obscure. But Brandimarte went further. He also discussed the risk of infection or contagion to the priest or minister himself, especially in the case of a patient suffering from the plague. He remarked that, “although some absolutely affirm that the parish priest is not obliged to expose himself to danger of death, in order [for instance] to give Viaticum to plague victims, nevertheless learned men hold that he is obliged.”<sup>24</sup> Here, then, Brandimarte sided with Borromeo, Liguori, and Lambertini, in acknowledging the moral imperative for the sick person to be able to receive Holy Communion, but at the same time he proposed a rather elaborate workaround that negated both the use of an instrument and Lambertini’s already rather elaborate plan for the reception of Holy Communion in the hand, as a limited exception in extreme cases of potential infection or contagion. Rather, he suggested that the consecrated Host be placed on a sheet of paper (*foglio*), itself placed on a little altar (*altarino*) designed for the purpose, and that the sick person then be permitted to communicate his or her own self by adhering the Host directly on their tongue, without touching the Host with his or her hands.

<sup>21</sup> Ibid., 76. “Non si deve dare il Viatico ad un’infermo, che è afflitto dalla tosse, o dal vomito, se vi è pericolo d’irriverenza.”

<sup>22</sup> Ibid. “Si potrebbe fare la prova con qualche cibo, e se si vedesse, che lo ritiene mezza ora, allora si potrà comunicare.”

<sup>23</sup> Ibid., 76-77. “Ma se non potesse inghiottire la particola, e se, prima fatta l’esperienza con altra cosa, si osserva, che può inghiottirla in cosa liquida, come sarebbe nel brodo, o in altra materia, allora in quella maniera si comunichi anche con piccola particella dell’Ostia, dovendosi tentare ogni mezzo, acciocchè non resti nell’estremo privo dell’Eucaristia.”

<sup>24</sup> Ibid., 77. “Sebbene alcuni assolutamente affermano, che il Parroco non sia obbligato esporsi al pericolo di morte, per dare il Viatico agli appestati, nondimeno uomini dottissimi tengono, che sia obbligato.”

Brandimarte's approach certainly excluded the practical risk of the priest touching the sick person, and also the use of an instrument—so clearly rejected by the authors—and even the exceptional use (which, admittedly, even Lambertini suggests would require episcopal permission) of Holy Communion in the hand. Brandimarte described his proposed process in this way: “In some places the Host has been placed on a white sheet on a little altar prepared for this purpose, which the plague victim approaches, he takes the Sacrament with his tongue, and then the cleric with a candle on top of a wand [(*una bacchetta*)] touches the paper with the fire and burns it.”<sup>25</sup>

Let me bring all of this to something of a conclusion. As I began this essay by saying, in times of serious illness the Church has a history of responding to real pastoral need by accommodating her liturgical and sacramental discipline while preserving both the proper dignity and respect due the sacraments.<sup>26</sup> At the same time, she has consistently recognized the just and moral demand to continue to offer the sacraments even to those who, to the world, may be beyond reasonable pastoral care. However these provisions have been made, the same urgency and genuine desire for the salvation of souls has been the guiding principle. At times, as this brief historical review has shown, the balance between the just administration of the sacraments to those in ill health and the concern for the integrity of the liturgical rite, to say nothing of the risks of profanation, have been recalibrated and adjusted. Whatever the extremes found in these circumstances, it remains a great comfort and solace that today the Church continues in this task and thereby demonstrates in her pastoral ministry not only the essential nature of her careful and methodical consideration of these matters in her discipline and law, or even the value of the sacraments themselves, but also the supreme law that guides all her actions: *salus animarum suprema lex*.

<sup>25</sup> Ibid., 77. “Dicono però, che può servirsi di qualche strumento per evitare il pericolo della morte. In alcuni luoghi si è usato di porre la particola in un foglio bianco sopra un’Altarino a ciò preparato, a cui accostandosi l’appestato piglia colla lingua il Sagramento, e poscia il Chierico con una candela accesa in cima di una bacchetta attacca a quella carta il fuoco, e l’abbrucia.”

<sup>26</sup> Given contemporary debates on the method of the distribution of Holy Communion in times of serious sickness, including the question of restricting the reception of Holy Communion on the tongue, it seems necessary to state that it is not my view that these limited, historical examples are grounds for resolving this disputed point. In each example given here, the author is speaking of very specific, limited, and defined situations, not the normative reception of Holy Communion during Mass celebrated in a church.

## **OIKONOMÌA AND REMARRIAGE IN THE ORTHODOX TRADITION: A PASTORAL SOLUTION FOR THE CATHOLIC CHURCH?**

PATRICK CONNOLLY

**SUMMARY** — The pastoral problem of divorce and remarriage among Catholics, especially in the developed world, has caused some Catholic authors to give attention to the Orthodox notion of *oikonomia* and how it might be applied to the marriage discipline of the Catholic Church. The pastoral crisis has created favourable comment from Catholic writers on Eastern marriage practices, which allow remarriage after a period of penance. This article considers whether this truly is a viable pastoral solution or is in fact incompatible with the Catholic understanding of marital indissolubility.

**RÉSUMÉ** — Le problème pastoral du divorce et du remariage chez les catholiques, surtout dans les pays développés, a amené certains auteurs catholiques à s'intéresser à la notion orthodoxe d'*oikonomia* et à la manière dont elle pourrait être appliquée à la discipline matrimoniale de l'Église catholique. La crise pastorale a suscité des commentaires favorables de la part des auteurs catholiques sur les pratiques orientales en matière de mariage, qui permettent un remariage après une période de pénitence. Cet article examine si cette solution pastorale est vraiment viable ou si elle est en fait incompatible avec la conception catholique de l'indissolubilité conjugale.

### ***Introduction***

Since the Second Vatican Council, there has been a renewed Catholic interest in all the separated Eastern Churches, but especially the Orthodox, epitomised by Pope St. John Paul II's anatomical metaphor of the Church breathing with two lungs. In this context, the Church of Rome is the *West* (while comprised of both Latin and Eastern Catholic Churches) and the Church of Constantinople (the Orthodox Church) is the *East*. "In this perspective an

expression which I have frequently employed finds its deepest meaning: the Church must breathe with her two lungs! In the first millennium of the history of Christianity, this expression refers primarily to the relationship between Byzantium and Rome.”<sup>1</sup> Connected with this wider awareness is ongoing discussion in Catholic circles about various Orthodox theological concepts, including *oikonomia* and comparable related ideas in Latin canon law.<sup>2</sup>

However, it is the significant pastoral problem of divorce and remarriage among Catholics, especially in the developed world, which has caused Catholic authors to give more attention to *oikonomia* and how it might be applied to the marriage discipline of the Catholic Church. The pastoral crisis has created favourable comment from Catholic writers on Eastern marriage practices, which allow remarriage followed by readmission to Holy Communion after a period of penance.<sup>3</sup> This simultaneously affirms the indissolubility of marriage while dealing with those whose marriages have failed. The first marriage is always seen as the ideal and the fully sacramental one, yet even a third marriage in church is allowed on grounds which all are viewed as having a Scriptural root.

*Oikonomia* also has received some passing mention in papal conversation. In 2013, in answer to a question about reception of the sacraments by the divorced and remarried, Pope Francis noted that the Orthodox have a different practice that they call *oikonomia*, which means “they give a second chance.”<sup>4</sup> In 2005, at a meeting with clergy, Benedict XVI mentioned that the Orthodox Churches often are presented as a model for the possibility of remarriage, with *oikonomia* being invoked to allow the couple to go to Communion, though he added that Eastern Churches have conceded the possibility

<sup>1</sup> JOHN PAUL II, Encyclical *Ut unum sint*, 25 May 1995, no. 54:

[http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25051995\\_ut-unum-sint\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25051995_ut-unum-sint_en.html)

<sup>2</sup> See, for instance, R. PAGÉ, “Canon Law and Equity, *oikonomia*, and *epikeia*,” in *CLSAP*, 81 (2019), 1-22.

<sup>3</sup> In this study, we will not be dealing with the issue of the admission to Communion of divorced/civilly remarried Catholics, where *oikonomia* is also sometimes seen as a solution. It is worth noting, however, that for some authors (though not all) on one side of the debate is a fear that such readmission has long-term doctrinal implications for indissolubility, for instance: “... admitting the divorced and remarried to Communion would inevitably require the Catholic Church to recognise and bless second marriages after divorce, which is clearly contrary to settled Catholic dogma and Christ’s express teaching” (J. CORBETT et al., “Recent Proposals for the Pastoral Care of the Divorced and Remarried: A Theological Assessment,” *Nova et Vetera*, English Edition, 12 [2014], 612).

<sup>4</sup> FRANCIS, Apostolic Journey to Rio de Janeiro on the occasion of the XXVIII World Youth Day: Press Conference during the Return Flight, 28 July 2013: [https://www.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco\\_20130728\\_gmg-conferenza-stampa.html](https://www.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-conferenza-stampa.html)

of divorce too easily and “seriously injured” the principle of indissolubility and the true sacramental character of marriage.<sup>5</sup>

While *oikonomia* applied to remarriage can be seen as contradictory or illogical, it is attractive not only because of the pastoral solutions it provides but also because the Council of Trent avoided a condemnation of Eastern marriage practices. Nonetheless, while a door may appear ajar for development of Catholic marriage discipline, the Oriental situation is not as trouble-free as it may first appear. If reflection on indissolubility as experienced within the Eastern traditions is going to make an impact on Catholic thought, it needs to be examined by reference to the particular categories used, and to address the questions posed, by the doctrine and the actual canonical practice of the Catholic Church.

## **1 — Development of Catholic Teaching and Practice on Indissolubility**

Catholic teaching does not hold that every marriage is indissoluble; rather, it is a consummated marriage between two baptised Christians which can never be dissolved except by death. In other words, there are limits to indissolubility. Moreover, Catholic canonical thought distinguishes between “intrinsic indissolubility” (referring to the inability of spouses themselves to dissolve their marriage) and “extrinsic dissolubility” (the dissolution of a marriage by an outside third party, in this case, the Church). The current nuanced Catholic doctrine developed over a long period of time, in a particular Western historical context. The following sketch of some key points in its historical elaboration is not meant to be comprehensive but rather to offer a background to how the Eastern Churches’ practices can be seen in light of Catholic doctrine and practice.

### **1.1 — The New Testament and Early Christianity**

Concerning divine positive law,<sup>6</sup> the history of the notion of indissolubility in the Church is a complicated one, especially regarding the interpretation

<sup>5</sup> BENEDICT XVI, Meeting with Diocesan Clergy of Aosta: Address of His Holiness, 25 July 2005: [https://www.vatican.va/content/benedict-xvi/en/speeches/2005/july/documents/hf\\_ben-xvi\\_spe\\_20050725\\_diocesi-aosta.html](https://www.vatican.va/content/benedict-xvi/en/speeches/2005/july/documents/hf_ben-xvi_spe_20050725_diocesi-aosta.html)

<sup>6</sup> We will not cover the disputed question of whether every marriage is intrinsically indissoluble by the natural law. For a synopsis of the two Catholic views on this question, see



of the Scriptures and the writings of some Church Fathers. A brief word about both issues is necessary.

Jesus identified the Old Testament practice of divorce as a consequence of the hardness of the human heart, then pronounced the radical command, “Therefore what God has joined together let no one separate” (Mk 10:9). He took an unquestionably uncompromising stand against divorce. “Anyone who divorces his wife and marries another woman commits adultery, and the man who marries a divorced woman commits adultery” (Lk 16:18). “Whoever divorces his wife and marries another woman commits adultery against her; and if she herself divorces her husband and marries another, she is committing adultery” (Mk 10:11-12). St. Paul saw marriage between man and woman united in one flesh as a profound mystery reflecting the union of Christ and the Church (Eph 5:31-32) and declared: “To the married I give this command (not I, but the Lord): a wife must not separate from her husband. But if she does, she must remain unmarried or else be reconciled to her husband. And a husband must not divorce his wife” (1 Cor 7:10-11).

However, while Jesus condemned divorce, an exception appears twice in Matthew’s Gospel. “But I tell you that anyone who divorces his wife, except for sexual immorality [*porneias*], makes her the victim of adultery [*moicheuthēnai*], and anyone who marries a divorced woman commits adultery [*moichatai*” (Mt 5:32). “I tell you that anyone who divorces his wife, except for sexual immorality (*porneia*), and marries another woman commits adultery [*moichatai*” (Mt 19:5). The meaning of the exceptive phrases in Matthew has attracted enormous exegetical attention, since it seems to qualify Jesus’ absolute prohibition of divorce found in the other Synoptic Gospels. Some interpret the term *porneia* as “adultery” and allow divorce and remarriage when adultery occurs. This has been critiqued as not explaining why the apostles were taken aback by Christ’s saying, especially in the context in which Jesus speaks of unconditional forgiveness (Mt 18:21-35). Nor does it sit coherently with the other Synoptic Gospels, in which the prohibition on divorce is unconditional.

On the other hand, some interpreters claim that the exceptive clause in Matthew refers only to the repudiation of a guilty party for adultery, or that

U. NAVARRETE, *Structura juridica matrimonii secundum Concilium Vaticanum II*, Rome, Pontificia Universitas Gregoriana, 1968, 101-103. Whereas it was acknowledged that it was characteristic of marriage, there were disputes among the Scholastics as to whether indissolubility was mandated by the natural law. For an explanation of Aquinas’ view, and of the distinction made by him between the primary and secondary precepts of the natural law, see L. RYAN, “The Indissolubility of Marriage in Natural Law,” in *The Irish Theological Quarterly*, 30 (1963), 293-310; 31 (1964), 62-77.

Jesus is asserting that, in the case of *porneia*, the marriage has been defiled and the guilty party *must* be sent away because future contact with such a person could result in the defilement of the other party; but the text does not indicate that the innocent party is free to marry again. Others argue *porneia* is the equivalent of the Hebrew *zenûit*, referring to incestuous or illegitimate marriages (like that of Herod, Mt 14:3-4) prohibited by the Law (Lv 18:10, 20:21); *porneia*, refers then to a union that was invalid from the beginning.<sup>7</sup>

The Catholic tradition has not understood the Matthean texts as permitting remarriage as distinct from separation, and the Magisterium holds that this position is faithful to the teaching of Christ. Given the lack of clarity, the Catholic Church has taken no real cognisance of the “exception clause” in its marriage discipline.<sup>8</sup> It does not seem likely that the question of the precise meaning of the exception in Matthew will ever be resolved to the extent of assisting definitively in any development of the Church’s doctrine.<sup>9</sup>

There existed a clear consensus among the Church Fathers regarding the indissolubility of marriage. Nonetheless, there have been scholarly debates about whether some of the Fathers allowed divorce and remarriage for Christians in some cases.<sup>10</sup> While the general patristic tradition is very firm indeed on the principle of the indissolubility, there were some ancient authors who seemed to allow for flexibility in certain cases. Some patristic texts and canons of local Councils can be read to be approving of, or at least ambiguous about, remarriage. St. Basil of Caesarea is often mentioned in this regard. Since Vatican II, some Catholic scholars are inclined to read such authors

<sup>7</sup> See A. LÓPEZ, “Marriage’s Indissolubility: An Untenable Promise?” in *Communio*, English edition, 41 (2014), 293-295.

<sup>8</sup> See the conclusion of J. RATZINGER, “Introduzione,” in CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Sulla pastorale dei divorziati risposati: documenti, commenti e studi*, Vatican City, Libreria editrice Vaticana, 1998 (= CDF, *Sulla pastorale dei divorziati risposati*). “Extensive literature exists regarding the correct understanding of the *porneia* clauses, with many differing and even conflicting hypotheses. There is no unanimity among exegetes on this point. [...] the Church cannot construct her doctrine and praxis on uncertain exegetical hypotheses. She must adhere to the clear teaching of Christ.”

<sup>9</sup> About this point, see W. KOWAL, “Twenty Years after the Promulgation of the Catechism of the Catholic Church: Doctrinal Foundations for Marriage,” in *StC*, 47 (2013), 198-199 (= KOWAL, “Twenty Years after the Promulgation of the Catechism”).

<sup>10</sup> For a discussion of this issue, see E. HAMEL, “The Indissolubility of Completed Marriage: Theological, Historical, and Pastoral Reflections” (= HAMEL, “The Indissolubility of Completed Marriage”) in J.R. CONNERY and R. MALONE (eds.), *Contemporary Perspectives on Christian Marriage: Propositions and Papers from the International Theological Commission*, Chicago, Loyola University Press, 1984, 181-188 (= CONNERY and R. MALONE [eds.], *Contemporary Perspectives*). See also G. PELLAND, “La pratica della Chiesa antica relativa ai fedeli divorziati risposati,” in CDF, *Sulla pastorale dei divorziati risposati*, 99-131.

and local Councils in a way similar to the Orthodox and deduce some patristic approval for second marriages in particular cases.<sup>11</sup> On the other hand, these textual approaches have been challenged under various headings: for conflating the overall practice of the early Church with a certain number of cases spread over a period of four or five centuries; for proposing methodological hypotheses but then forgetting they are merely hypotheses; for arguments *ex silentio*; for straightforwardly concluding that an author is contradicting what he maintains elsewhere; for not seeing statements in their ancient context but rather in modern canonical terms; for using far from proven principles (e.g. “divorce implied permission for a new marriage”, “Christians could not do what the civil law did not require”); and for not taking into account that the primitive Church was far more severe than the contemporary one in its approach to grave sin.<sup>12</sup>

The problem is that these various disputed texts on remarriage do not usually offer unambiguous affirmations, and scholarship cannot clarify everything. In terms of clarity, Ambrosiaster seems to be the only Church Father to have explicitly and undisputedly said that a divorced spouse may legitimately enter a new marriage while the other spouse lives. It is worth noting the conclusion of the Jesuit patristic scholar H. Crouzel, who spoke of the quasi-unanimity of the first five centuries concerning the refusal of another marriage after separation as the only solid historical given. Crouzel also noted the huge difference between the Church to some extent having to tolerate second unions versus allowing or blessing them.<sup>13</sup>

<sup>11</sup> See, for example, G. CERETI, *Divorzio, nuove nozze e penitenza nella Chiesa primitiva*, Aracne Editrice, Rome, 2013 (first published 1977); J.A. CORIDEN and K.R. HIMES, “The Indissolubility of Marriage: Reasons to Reconsider,” in *Theological Studies*, 65 (2004), 471-472.

<sup>12</sup> See G. PELLAND, “Did the Church Treat the Divorced and Remarried More Leniently in Antiquity than Today?” in *ORE*, 2 February 2000, 9.

<sup>13</sup> H. CROUZEL, *L'Église primitive face au divorce: du premier au cinquième siècle*, Paris, Beauchesne, 1971, 382: “[...] il ne nous paraît pas concevable que l'Église puisse un jour autoriser quelqu'un, dont le mariage est certainement valide, sacramentel et consommé, à contracter de nouvelles noces du vivant de son conjoint. La quasi-unanimité des cinq premiers siècles concernant le refus d'un mariage après séparation constitue en effet, dans le désarroi complet des exégètes contemporains sur le sens des incisives, la seule donnée solide: ainsi l'Église dès le début a-t-elle compris, dans l'interprétation vivante que donnent ses institutions, ces expressions difficiles. [...] autre chose est d'accepter qu'un chrétien contracte de nouvelles noces après divorce et même de bénir cette union, autre chose est de tolérer dans une certaine mesure, bien qu'elle soit adultère, une union conclue devant les instances civiles et qui ne peut être rompue par suite des responsabilités qui en découlent. [...] On pourrait donc reprocher aux théologiens et aux historiens qui, examinant les textes de façon imprécise et inexacte, voient dans les quelques témoignages d'indulgence trouvés

## 1.2 — Before Trent

In the West, from the fifth century onwards, as bishops consulted the papacy about difficult cases, the popes asserted the indissolubility of marriage and tried to contain abuses tolerated by local councils.<sup>14</sup> Papal resistance to civil law being used as justification for divorce was illustrated by Pope Gregory the Great in 601, when he denied that the entry of a spouse into monastic life dissolves a marriage: civil law may allow this, but divine law forbids it.<sup>15</sup> Yet the Western Church did not come to understand every marriage as absolutely indissoluble. Based on First Corinthians, the Pauline Privilege (the dissolution of marriage of two persons not baptised at the time the marriage occurred) was recognised,<sup>16</sup> and the praxis of the Church

chex les Pères l'acceptation d'un nouveau mariage, de céder à cette confusion et de rendre encore plus difficile à l'Église contemporaine la mise au point d'une solution."

On the other hand, J. Beal makes the point that to reconstruct the praxis of the early Church solely from the pronouncements of the Fathers is to ignore the field of social history, a bit like reconstructing the practice of American Catholics in regard to artificial contraception on the sole basis of episcopal pronouncements. See J. BEAL, "Intolerable Marriage Situations Revisited," in *J*, 63 (2003), 285, footnote 92.

<sup>14</sup> See HAMEL, "The Indissolubility of Completed Marriage," 189-198. For a historical survey of the problem of indissolubility in the Western Church between the sixth century and Gratian, see G.H. JOYCE, *Christian Marriage*, London, Sheed and Ward, 1933, 328-358. Cf. J. GAUDEMET, *Le mariage en Occident: les mœurs et le droit*, Paris, Cerf, 1987, 106-107, 119-132.

<sup>15</sup> In his *Novella* 22, the Emperor Justinian had ruled that if one spouse wanted to enter monastic life and did so even against the will of the other, the marriage was dissolved. The apparent principle was that one spouse's will could override the other's in this case. In a reverse interpretation of the law, some Christian husbands, wanting to divorce, forced their wives into monastic life to gain the dissolution. Attempting to combat this abuse, Pope Gregory I declared that the entry into monastic life does not dissolve marriage in the first place, despite what the civil law may say. See GREGORY THE GREAT, Letter to Theoctista (the sister of Emperor Mauritius), *Magnas omnipotenti*, February 601, in D. NORBERG (ed.), *Corpus christianorum*, series latina, vol. 140a, *S. Gregorii Magni Registrum epistularum*, Turnhout, Brepols, 1982, 902-913.

<sup>16</sup> 1 Cor 7:10-15: "To the married I give this command (not I, but the Lord): a wife must not separate from her husband. But if she does, she must remain unmarried or else be reconciled to her husband. And a husband must not divorce his wife. To the rest I say this (I, not the Lord): if any brother has a wife who is not a believer and she is willing to live with him, he must not divorce her. And if a woman has a husband who is not a believer and he is willing to live with her, she must not divorce him. For the unbelieving husband has been sanctified through his wife, and the unbelieving wife has been sanctified through her believing husband. Otherwise, your children would be unclean, but as it is, they are holy. But if the unbeliever leaves, let it be so. The brother or the sister is not bound in such circumstances; God has called us to live in peace."

admitted the dissolution of unconsummated marriages.<sup>17</sup> History shows that a certain development took place regarding the Catholic Church's consciousness of its ability to dissolve certain types of marriages.<sup>18</sup> The well-known dispute in the twelfth century between the schools of Paris and Bologna regarding what constitutes marriage included a conflict on indissolubility. Whereas Pope Alexander III "canonised" the consensual theory of marriage, he also adopted Gratian's view that a marriage created by consent is not indissoluble until consummation. In other words, once *consensus de praesenti* is given, the marriage is firm to the point that the spouses could not dissolve it (what was later called "intrinsic indissolubility"); but when the marriage is consummated, it could not be dissolved by any human power ("extrinsic indissolubility"). Hence, the teaching in the West was that a sacramental consummated marriage could not be dissolved, except by death. This doctrinal synthesis remains the teaching of the Catholic Church.<sup>19</sup>

A divergence emerged between East and West regarding the indissolubility of a consummated Christian marriage. Yet, in 1274 at the Second Council of Lyons, the issue of indissolubility was almost ignored, although in the Profession of Faith of the Eastern Emperor Michael Paleologus, read to the Council, there was a declaration that death frees the spouses from the conjugal bond, without mention of any other causes.<sup>20</sup> This was interpreted by some as an implicit affirmation of indissolubility, though it was more likely concerned with Oriental Christians who found something wrong with a second marriage after the death of a spouse.

In 1341, Pope Benedict XII, in a letter to the Armenian Church, condemned (in proposition 102) as one of the errors imputed to the Armenians, that they allowed remarriage in cases other than the death of one of the spouses.<sup>21</sup> On the other hand, in 1439 at the Council of Florence, the question was not really debated with the representatives of the Byzantine Church, and

<sup>17</sup> Hincmar, Archbishop of Reims (d. 882), seems to have been the first to allow for dissolution of a marriage entered into but not consummated.

<sup>18</sup> For a sketch of this development, see U. NAVARRETE, "Indissolubilitas matrimonii rati et consummati: opiniones recentiores et observationes," in *Periodica*, 58 (1969), 475-489.

<sup>19</sup> See INTERNATIONAL THEOLOGICAL COMMISSION, *Propositiones de quibusdam quaestionibus doctrinalibus ad matrimonium christianum pertinentibus*, in *Gregorianum*, 59 (1978), 461-463 (proposition no. 4: *De indissolubilitate matrimonii*).

<sup>20</sup> See the Profession of Faith of Emperor Michael VII Paleologus, in DENZ, no. 860, 382.

<sup>21</sup> "Item, quod apud Armenos, si post matrimonium contractum, etiam carnali copula subsecuta et prole suscepta, viro non placeat uxor; vel e converso, ille cui non placet alter coniux, vel ambo, si sibi mutuo non placent, vadit vel vadunt ad episcopum vel sacerdotem et data pecunia et secundum quod inter se conveniunt, episcopus seu sacerdos separat dictum matrimonium et dat licentiam alter nubendi, etiam cum altero coniuge invito; et hoc fit multoties

it did not figure in the conciliar decree of union with the Greeks.<sup>22</sup> The issue of indissolubility was raised by Pope Eugene IV at the last moment, but the decree of union had already been signed. The Greeks' response noted that divorce was permitted only for a just cause (apparently harking back to Origen). While emphasizing that a change was necessary, the Latins let the question drop.<sup>23</sup> However, later that year, when the Armenians signed an act of union, that decree laid down that "although separation of bed is lawful on account of fornication, it is not lawful to contract another marriage, since the bond of a legitimately contracted marriage is perpetual."<sup>24</sup> In 1442, this decree was imposed on the Syrian Jacobites reuniting with Rome.<sup>25</sup>

### 1.3 — The Tridentine Canon Seven on Marriage (1563)

A great influence in the Catholic Church remains canon seven on the sacrament of marriage, of the twenty-fourth session of the Council of Trent.

If anyone says that the Church erroneously taught and teaches, according to evangelical and apostolic doctrine, that the bond of matrimony cannot be dissolved by the adultery of one of the spouses; and that neither party, even the innocent one who gave no grounds for the adultery, can contract another marriage while their spouse is still living; and that the husband commits adultery who dismisses an adulteress wife and takes another woman, as does the wife dismissing an adulterous husband and marrying another man: let him be anathema.<sup>26</sup>

apud Armenos" (BENEDICT XII, Letter to the Armenians, *Cum dudum*, 1 August 1341, in *Fonti orientales*, series III, vol. 8, 151, proposition 102).

<sup>22</sup> See EUGENE IV, Bull *Laetentur caeli*, 6 July 1439, in TANNER, vol. 1, 523-528.

<sup>23</sup> See HAMEL, "The Indissolubility of Completed Marriage," 199. Cf. the commentary of Origen on Matthew's Gospel: ORIGEN, *In Matt.* 19: 2-11, in *PG*, vol. 13, cols. 1245-1246. See also J. GILL, *The Council of Florence*, Cambridge, Cambridge University Press, 1959, 296-297.

<sup>24</sup> "Quamvis autem ex causa fornicationis liceat thori separationem facere, non tamen aliud matrimonium contrahere fas est, cum matrimonii vinculum legitime contracti perpetuum sit" (EUGENE IV, *Exultate Deo* [*"Bulla unionis Armenorum"*], in TANNER, vol. 1, 550).

<sup>25</sup> See EUGENE IV, Bull *Cantate Domino* [*"Bulla unionis Coptorum"*], 4 February 1442, in TANNER, vol. 1, 581. In contradistinction to some Oriental thinking, it also was asserted that a fourth marriage may be entered after the death of the spouse. See *ibid.*

<sup>26</sup> "Si quis dixerit, Ecclesiam errare, cum docuit et docet, iuxta evangelicam et apostolicam doctrinam [cf. praecipue Mt 5:32, 19:9; Mr 10:11-12; Lc 16:18; 1 Cor 7:11], propter adulterium alterius coniugum matrimonii vinculum non posse dissolvi, et utrumque, vel etiam innocentem, qui causam adulterio non dedit, non posse, altero coniuge vivente, aliud matrimonium contrahere, moecharique eum, qui dismissa adultera aliam duxerit, et eam, quae dismissa adultero alii nupserit, a.s." (COUNCIL OF TRENT, Session 24, Canon 7 on the Sacrament of Marriage, in TANNER, vol. 2, 754-755).

This canon was worded so as not to condemn Oriental practices, yet it did condemn Luther, who was accusing the Catholic Church of having lapsed into error. The canon must be read in conjunction with canon five forbidding divorce on the grounds of heresy, irksome cohabitation, or the departure of one of the spouses. Canon eight defended the Church's right to allow separation in some cases.<sup>27</sup>

Trent did not deny the existence of practices and beliefs that differed from its teaching. Nonetheless, the Council saw divorce, on account of adultery or for the other reasons mentioned, as contrary to an authentic teaching consistent with the Scriptures. Yet, the cautious formulation of the canon shows that the Council was aware of the doubts arising from some patristic texts and from some Catholic theologians, and it did not wish to condemn formally some positions and practices upheld by the Eastern Churches.<sup>28</sup> Nevertheless, after Trent, the Holy See's long struggle against tolerating the remarriage of divorcees among Oriental Christians reunited with Rome shows that indissolubility was not regarded solely as a disciplinary issue but as one intimately connected with the Catholic doctrine on the nature of marriage.

By the late nineteenth century, canon seven was regarded by many Catholic theologians as a dogma *de fide*, that is, a truth directly revealed by God, as Vatican I had defined such after three centuries of theological reflection. However, in the mid-twentieth century, the scholarship of P. Franzen was influential in revising this assessment, although he maintained that canon seven was more than a disciplinary decree.<sup>29</sup> More recently, E.C. Brugger has contested the view that Trent avoided condemnation of Oriental divorce and remarriage in a way that left open the possibility of a later Catholic approbation of such practices. He argues that, while Trent avoided direct condemnation of these practices, it left no doubt that the complete

<sup>27</sup> For the text of canons 5 and 8, see *ibid.*, 754, 755.

<sup>28</sup> Hamel comments: "As far as its content is concerned, canon 7 denied the possibility of dissolving the conjugal bond in case of adultery and the liceity and validity of remarriage. It makes no distinction between intrinsic and extrinsic indissolubility. The context favours the view that intrinsic indissolubility was meant, but this was not explicitly stated. Nor did canon 7 make a distinction between consummated and non-consummated marriages. It did not decide the question of whether the Church has any power over sacramental and consummated marriage" (HAMEL, "The Indissolubility of Completed Marriage," 201).

<sup>29</sup> See P. FRANZEN "Divorce on the Grounds of Adultery—the Council of Trent (1563)," in *Concilium*, 6 (1970), no. 5, 89-100, where he summarised his conclusions from previously published works. See also L. BRESSAN, *Il canone Tridentino sul divorzio per adulterio e l'interpretazione degli autori*, Rome, Università Gregoriana, 1973.



indissolubility of consummated Christian marriage is taught definitively.<sup>30</sup> In any event, P. Delhaye has noted: “It is not possible to speak of indissolubility as a dogma of faith in the strict sense of the phrase, but neither can it be denied that we are dealing here with Catholic doctrine endowed with all the solidity implied in that theological note.”<sup>31</sup>

#### 1.4 — The “Extension” of the Pauline Privilege and the Development of the Petrine Privilege

The Catholic Church’s evolving view of the indissolubility of non-sacramental marriages is illustrated in the way that the Pauline Privilege *in favorem fidei* underwent development. The Pauline Privilege was “extended” in the sixteenth century by three popes to cover certain missionary situations.<sup>32</sup> In 1537, Paul III’s Constitution *Altitudo* allowed a polygamist man who converted to Christianity and was baptised to choose one of his wives if he could not remember which was his first. Pius V’s *Romani pontifices* (1571) permitted the baptised polygamist convert to keep the wife baptised with him, even if she was not the first. Gregory XIII, in *Populis ac nationibus* (1585), gave some missionaries the faculty to dispense baptised slaves or captives from the obligation of conducting the interpellation of their former spouse before entering a second marriage with another Christian and said that this second marriage, once consummated, remained binding even if later it was discovered that the original valid marriage had been made sacramental by the baptism of both spouses. Subsequently, these Constitutions were interpreted in two differing ways. The more dominant school considered this legislation to belong to the discipline of the Pauline Privilege, whereas a second school saw in these Constitutions evidence of a papal or “Petrine” power to dissolve certain marriages.<sup>33</sup>

<sup>30</sup> Brugger concludes: “The nagging suggestion ... that the Council of Trent does not teach definitively the doctrine of absolute indissolubility should finally be put to rest” (E.C. BRUGGER, *The Indissolubility of Marriage and the Council of Trent*, Washington, DC, Catholic University of America Press, 2017, 146).

<sup>31</sup> P. DELHAYE, “Commentary on the Propositions on the Doctrine of Christian Marriage,” in CONNERY and R. MALONE (eds.), *Contemporary Perspectives*, 29.

<sup>32</sup> See J.J. KOURY, *Three Sixteenth Century Constitutions on the Dissolution of Marriage: A Study in Lawmaking and the Uses of Law*, Canon Law Studies, no. 517, Washington, DC, Catholic University of America, 1985, 28-202.

<sup>33</sup> See *ibid.*, 212-241. Koury himself argues that the three Constitutions don’t fit into either the “Pauline” or “Petrine” framework, but should be understood as *ad hoc* papal concessions. The 1983 Code makes no reference to these Constitutions but in cc. 1148-1149 repeats their provisions with some modifications, as does the 1990 Oriental Code in cc. 859-860. Both Codes see them as extensions of the Pauline Privilege, as they do not require a dissolution



The 1917 Code asserted that, while all marriages are characterised by the essential property of indissolubility, in sacramental marriage the indissolubility gained a *unique* firmness (CIC/17 c. 1013 § 2). This left open the possibility that natural marriages could sometimes be dissolved, whilst declaring that a valid consummated Christian marriage could never be dissolved by any human power or cause except death (CIC/17 c. 1118). The Code included the Pauline Privilege, while also extending the provisions of the three sixteenth century papal Constitutions to the entire Church (CIC/17 c. 1125).

In the early twentieth century, there developed<sup>34</sup> what became known as the Petrine Privilege. In certain cases, a marriage could be dissolved by pontifical dispensation, if at the time at which it was entered into one of the spouses was a Christian and the other was not. Notwithstanding the Curial practice regarding such cases, it has been disputed whether it is papal power which dissolves the natural non-sacramental marriage.

Even after Vatican II, the Catholic Church lacked scholarly consensus about the nature of the power which justifies the dissolution of marriages *in favorem fidei*. This was obvious in the 1977 statement of the International Theological Commission.<sup>35</sup> Interestingly, it was intended to include canons in the 1983 Code, briefly setting forth elements of the substantive law and procedural norms for Petrine cases. In 2001, it was stated that it had been deemed more opportune not to include such complex material in the Code and to assign it to particular norms.<sup>36</sup> This meant that a proposed canon in

by the pope *in favorem fidei* (the so-called Petrine Privilege). See J.A. ALESANDRO, “The Canon Law of Marriage: Ever Old, Ever New,” in *CLSAP*, 72 (2010), 75, footnote 61.

<sup>34</sup> Before the 1917 Code, the Church regarded all baptised Christians, whether Catholic or not, as bound by the impediment of disparity of cult, so in the case of a non-Catholic Christian marrying an unbaptised person there was no occasion to seek a dispensation and thus such a marriage was invalid. With the advent of the 1917 Code, when non-Catholic Christians were no longer held to the impediment and such a marriage was held to be valid, a new pastoral situation arose if one of the parties later wanted to marry a Catholic. Also, in the 20<sup>th</sup> century there was a growth of marriages between Catholics and unbaptised parties celebrated with a dispensation from the impediment of disparity of cult.

<sup>35</sup> “Ecclesia nullam sibi agnoscit auctoritatem ad dissolvendum matrimonium sacramentale ratum et consummatum. Cetera autem matrimonia, sub gravissimis conditionibus, in bonum fidei salutemque animarum, a competenti auctoritate Ecclesiae, dissolvi, aut – secundum aliam interpretationem – saltem declarari soluta, possunt” (COMMISSIO THEOLOGICA INTERNATIONALIS, *Propositiones de quibusdam quaestionibus doctrinalibus ad matrimonium christianum pertinentibus*, 462).

<sup>36</sup> This is the not entirely convincing reason for the decision advanced in the Preface of the Congregation for the Doctrine of the Faith’s Norms on the Preparation of the Process for the Dissolution of the Marriage Bond in Favour of the Faith, issued on 30 April 2001. And the careful wording in the Preface about the Church’s power to dissolve is itself noteworthy:

the final schema of the 1983 Code which recognised the power of the Pope to dissolve the marriage of two non-baptised persons neither of whom intended to receive baptism was dropped in the promulgated Code. U. Betti, one member of the small group who reviewed the final draft of the Code along with Pope St. John Paul II, later claimed that the practice was so recent as to lack juridical stability; moreover, it was lacking in a secure theological foundation.<sup>37</sup>

Unlike the Pauline Privilege, there is no mention of the Petrine Privilege in either the 1983 Latin Code or in the 1990 Oriental Code; it continues to be governed by special norms.<sup>38</sup> While it is understandable to leave out complex procedural norms, it is indeed strange that there is no overarching canon mentioning Petrine cases in the Codes. This may be about avoiding raising doctrinal issues about the nature and limits of the Roman Pontiff's vicarious or ministerial power over marriage as the Vicar of Christ on earth.

## 1.5 — Vatican II

Given the pastoral scope of Vatican II's Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, it is not surprising to note that the essential properties of marriage—unity and indissolubility—are not treated in a technical way. Indeed, the general pre-conciliar Catholic understanding of indissolubility is almost assumed. Yet, in the autumn of 1964, E. Zoghby, Melchite Patriarchal Vicar for Egypt and Sudan, created a stir by suggesting that the Catholic Church could adopt the non-Catholic Oriental practice of allowing the remarriage of the innocent partner in the case of

“Convinced that the Church enjoys the power to dissolve marriages between non-Catholics, of whom at least one is unbaptised, the Roman Pontiff did not hesitate to meet the new pastoral conditions by introducing the practice of exercising this power of the Church in individual instances if it appeared to him, after an examination of all the aspects of each case, that it was duly in favour of the faith and the good of souls”:

[https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20010430\\_favor-fidei\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20010430_favor-fidei_en.html)

<sup>37</sup> See U. BETTI, “Appunto sulla mia partecipazione alla revisione del nuovo Codice di diritto canonico,” in D.J. ANDRÉS (ed.), *Il processo di designazione dei vescovi: storia, legislazione, prassi, Atti de X Symposium canonistico-romanistico (24-28 aprile 1995): in onore del Rev.mo P. Umberto Betti O.F.M.*, Libreria editrice Vaticana, 1996, 38-39; IDEM, “In margine al nuovo Codice di diritto canonico,” in *Antonianum*, 58 (1983), 633-634. See also J. KOWAL, “Nuove ‘Norme per lo scioglimento del matrimonio in favorem fidei’,” in *Periodica*, 91 (2002), 459-485.

<sup>38</sup> For a discussion of the current Roman norms promulgated in 2001, see J.J. KENNEDY, “The Dissolution of Marriage in Favour of the Faith: New Norms Invite a New Look at Our Practice,” in *CLSAP*, 67 (2005), 123-162.

adultery.<sup>39</sup> However, Zoghby's views on indissolubility were not accepted for discussion, because they were considered opposed to Catholic doctrine on Christian marriage and were officially declared by the Patriarch, Maximos IV, to be private opinions that did not reflect the mind of the Melkite Church.

In *Gaudium et spes* 47, unity and indissolubility are alluded to when the Council speaks of the dignity of marriage being marred by polygamy, divorce, and free love. Indissolubility is more clearly referred to in the next paragraph: "[...] from the human act whereby spouses mutually bestow and accept each other, there arises by the divine will an institution which is lasting, even in the eyes of society; for the good of the spouses, of the children, and of society, this sacred bond does not depend on human decision [for its continued existence]. For God himself is the author of marriage [...]"<sup>40</sup> Speaking of marriage as a natural reality, the Constitution teaches that the bond of marriage is not subject to the discretion of either or both partners—they have no power to dissolve it. The text does not delve into the varying grades of firmness possessed by different marital bonds. The distinction between intrinsic and extrinsic indissolubility is not mentioned, and the disputed issue of whether every marriage is intrinsically indissoluble by the natural law is left untouched. Apart from stating that marriage is indissoluble by divine institution, the Council does not discuss the nature of this indissolubility or its ultimate foundation. Proposing a complete doctrine of indissolubility was not on the conciliar agenda.

However, *Gaudium et spes* did relate the essential properties of marriage to its wider reality when it linked indissolubility with the good of the spouses, the children, and society. At the end of the same paragraph, it is said that "the intimate union of marriage, as a mutual giving of two persons, and the good of the children, demand total fidelity from the spouses and require an indissoluble unity between them."<sup>41</sup> So, there are two roots to the requirement that marriage be an unbreakable unity: the conjugal covenant and the good of the children. Later, in article 41, it is explicitly stated that the unity of marriage has been confirmed by the Lord.<sup>42</sup> By way of contrast, there is

<sup>39</sup> For a good account of Zoghby's two speeches, along with subsequent reactions and views, see A. WENGER, *Vatican II: chronique de la quatrième session*, Paris, Éditions du Centurion, 1966, 200-246.

<sup>40</sup> "[...] actu humano, quo coniuges sese mutuo tradunt atque accipiunt, institutum ordinatione divina firmum oritur, etiam coram societate; hoc vinculum sacrum intuitu boni, tum coniugum et prolis tum societatis, non ex humano arbitrio pendet. Ipse vero Deus est auctor matrimonii [...]" (GS 48 §1).

<sup>41</sup> "Quae intima unio, utpote mutua duarum personarum donatio, sicut et bonum liberorum, plenam coniugum fidem exigunt atque indissolubilem eorum unitatem urgent" (GS 48 §1).

<sup>42</sup> See GS 49 §2.

no mention in the conciliar text of divine positive law regarding indissolubility.

The speeches of Archbishop Zoghby created a controversy at Vatican II but had no impact on the text of *Gaudium et spes*. Although the conciliar exposition of the indissolubility of marriage is neither detailed nor technical, the prevailing Catholic doctrine underlies the conciliar text. Therefore, indissolubility received little attention during the revision processes for the 1983 Latin and 1990 Oriental Codes, which repeat the two statements of the pre-Vatican II legislations with only stylistic differences: the essential properties of marriage are unity and indissolubility, which in Christian marriage obtain a distinctive firmness by reason of the sacrament (*CIC* c. 1056 and *CCEO* c. 776 §3);<sup>43</sup> a sacramental consummated marriage cannot be dissolved by any human power or by any cause except death (*CIC* c. 1141 and *CCEO* c. 853). Nonetheless, the “Zoghby affair” did ignite a post-conciliar scholarly debate on Eastern remarriage practices and what could be learned from them, and much of the present Catholic discussion on such practices revolves around his intervention.

## 1.6 — Doctrinal Limits to the Church’s Authority on Indissolubility

The Catholic doctrine remains that a valid sacramental consummated marriage is indissoluble except by death. Nonetheless, since Vatican II, there has been a lot of scholarly discussion about reinterpreting the notions of sacramentality and consummation in Catholic teaching.<sup>44</sup> Some argue that the Catholic doctrine can undergo further significant development and stress that the Church’s stance on indissolubility evolved over a long time, in reaction to historical circumstances.<sup>45</sup>

<sup>43</sup> In the responses to the 1975 Latin schema on what was to be canon 1056 eventually, there was one proposal to distinguish between intrinsic indissolubility and extrinsic dissolubility. In February 1977, the study group decided to leave the canon intact, as this touched on doctrinal issues: see *Communicationes*, 9 (1977), 124.

<sup>44</sup> For an outline of some of this discussion of reinterpretation, see P. CONNOLLY, “Divorce, Remarriage and the Eucharist,” in *Doctrine and Life*, 64, no. 8 (2014), 2-17.

<sup>45</sup> See, for instance, CORIDEN and HIMES, “The Indissolubility of Marriage: Reasons to Reconsider,” 453-499, and the critical response by P.F. RYAN and G. GRISEZ, “Indissoluble Marriage: A Reply to Kenneth Himes and James Coriden,” in *Theological Studies*, 72 (2011), 369-415. There is an analysis of both articles by W. KOWAL, “Twenty Years after the Promulgation of the Catechism,” 190-193, 198-201. The Coriden-Himes thesis is also contested by M. LEVERING, *The Indissolubility of Marriage: ‘Amoris Laetitia’ in Context*, San Francisco, CA, Ignatius Press, 2019 (in chapter 2).

In a 2000 Rotal Address, in the context of various ideas being put forward in theological and canonical discussion about extending papal authority over marriage, Pope St. John Paul II addressed the idea that the Roman Pontiff's power, being the vicarious exercise of Christ's divine power, is not one of the human powers referred to in *CIC* canon 1141 and *CCEO* canon 853, which state that a consummated sacramental marriage "cannot be dissolved by any human power or for any reason other than death." The Pope rejected this idea and said it would lead to the thesis that no marriage is indissoluble, which would be contrary to what the Church has always taught.<sup>46</sup>

John Paul II refers to the teachings of his predecessors that papal power does not extend to ratified and consummated marriages,<sup>47</sup> listing some examples: Pius IX, Leo XIII, Pius XI, and Pius XII.<sup>48</sup> Except for the last one, John Paul II does not quote from any of the rest of them. He quotes only Pius XII on this subject, but an unquoted one is noteworthy from the perspective of our study: Pius IX, in his 15 August 1859 Letter, *Verbis exprimere*. The context in which this text was issued was a protracted dispute between Rome and the Catholic Byzantine bishops in Transylvania concerning remarriage practices. Pius IX explicitly told the bishops not only that the indissolubility of consummated Christian marriage did not originate in ecclesiastical discipline, but he said it concerned a matter of divinely revealed truth.<sup>49</sup> This latter claim needs to be seen by way of contrast to what John Paul himself asserts at the end of his Address about the theological status of the doctrine.

John Paul cites Pius XII's Address to the Roman Rota in 1941, saying that therein Pius had given an explicit interpretation of *CIC*/17 canon 1118 (corresponding to *CIC* canon 1141 and *CCEO* c. 853), in the sense that the expression "human power" does also include the Pope's ministerial or vicarious power. The Pope continues by also citing in support of this position the text of the Catechism of the Catholic Church (no. 1640), as it had great doctrinal authority not just on account of the special approval he himself gave to it but also because of the involvement of the whole Catholic

<sup>46</sup> JOHN PAUL II, Address to the Tribunal of the Roman Rota, 21 January 2000: [https://www.vatican.va/content/john-paul-ii/en/speeches/2000/jan-mar/documents/hf\\_jp-ii\\_spe\\_20000121\\_rota-romana](https://www.vatican.va/content/john-paul-ii/en/speeches/2000/jan-mar/documents/hf_jp-ii_spe_20000121_rota-romana)

<sup>47</sup> See *ibid.*, no. 6.

<sup>48</sup> See *ibid.*, no. 7.

<sup>49</sup> See PIUS IX, Letter to the Bishops of the Provinces of Fogaras and Alba-Iulia, *Verbis exprimere*, 15 August 1859, in *Fontes*, vol. 2, no. 526, 928-931; English translation in *Papal Teachings: Matrimony*, selected and arranged by the Benedictine monks of Solesmes, tr. M.J. BYRNES, Boston, MA, St. Paul Editions, 1963, 111-112.

episcopate in its drafting: “The Church does not have the power to contravene this disposition of divine wisdom.”<sup>50</sup>

The Catholic Church upholds that the “power of the keys” (*potestas clavium*) belongs to the Roman Pontiff as Successor of Peter (cf. Mt 16:19). Yet for John Paul, nothing in this papal *sacra potestas* includes any power over the divine law, natural or positive, and of course in saying this he would have no opposition whatsoever from current mainstream Catholic thinking. He next asserts in that context that neither Scripture nor Tradition has recognised any papal authority to dissolve a ratified and consummated marriage. In fact, he says the opposite is the case: the constant practice of the Church illustrates the certainty of the Tradition that no such power exists, and this latter permanent conviction of the Church has simply found its authentic interpretation and faithful echo in papal teaching over the last centuries.

Thus far, there is not much really new in what the John Paul was asserting. It is perhaps the last part of his 2001 Address which is the most interesting.

It seems quite clear then that the non-extension of the Roman Pontiff’s power to ratified and consummated sacramental marriages is taught by the Church’s Magisterium as a doctrine to be held definitively, even if it has not been solemnly declared by a defining act. This doctrine, in fact, has been explicitly proposed by the Roman Pontiffs in categorical terms, in a constant way and over a sufficiently long period of time. It was made their own and taught by all the Bishops in communion with the See of Peter, with the knowledge that it must always be held and accepted by the faithful. In this sense it was reaffirmed by the Catechism of the Catholic Church. Besides, it is a doctrine confirmed by the Church’s centuries-old practice, maintained with full fidelity and heroism, sometimes even in the face of severe pressures from the mighty of this world.<sup>51</sup>

Here we have a papal assertion that the proposition that the Pope has no power to dissolve a valid sacramental consummated marriage is a doctrine to be held definitively. John Paul is here giving a precise “theological note” to the teaching, that it belongs to the category of teaching described in *CIC* canon 750 § 2 and *CCEO* canon 598 § 2.<sup>52</sup> This doctrinal category refers to

<sup>50</sup> John Paul II, Address to the Tribunal of the Roman Rota, 21 January 2000 no. 7; CCC, no. 1640: [https://www.vatican.va/archive/ENG0015/\\_P54.HTM](https://www.vatican.va/archive/ENG0015/_P54.HTM)

<sup>51</sup> *Ibid.*, no. 8.

<sup>52</sup> For a succinct and clear explanation of this doctrinal category, see J.M. HUELS, *The Teaching Office of the Catholic Church: A Commentary on Book III of the Code of Canon Law*, Ottawa, ON, Saint Paul University, 2017, 24-28.

“those things required for the holy keeping and faithful exposition of the deposit of faith,”<sup>53</sup> to “truths necessarily connected to divine revelation ... either for historical reasons or by a logical relationship,”<sup>54</sup> and to “those elements of doctrine ... without which the saving truths of the faith cannot be preserved, explained, or observed.”<sup>55</sup> While doctrines belonging to this category are not regarded as divinely revealed, they are understood to be strictly and closely connected with revelation, which is why they must be firmly accepted and held.<sup>56</sup>

Stating that the non-extension of the Roman Pontiff’s power to consummated sacramental marriages belongs to the second doctrinal category is a clear-cut assertion of the proposition’s status. According to Pope John Paul II, rejecting this proposition means one is opposed to the doctrine of the Church. Why so strong a categorization? If nothing else, it was aimed at putting limits on scholarly discussion, by bringing closure to one possible line of development (that the Roman Pontiff by his vicarious and ministerial power could dissolve other categories of marriage). At another broader level, there seemed to be a profound concern on John Paul’s part that the notion of indissolubility supported by Scripture and Tradition would become meaningless if the Church could dispense from the obligations of a valid sacramental consummated marriage. This concern is not without merit.

## 2 — *Indissolubility in the Eastern Churches*

The most important cities of the Eastern Empire—Alexandria and Antioch from the beginning, then Byzantium as capital of the Empire, with the name Constantinople—became great centres of Eastern Christianity, quasi-mother Churches of other Churches. We speak of five original traditions—three within the borders of the Empire: Antioch with Jerusalem (or West Syrian), Alexandria, and Constantinople; and two on the borders: the East Syrian (or Chaldean) tradition and the Armenian. From these five Eastern traditions

<sup>53</sup> *CIC* c. 750 §2; *CCEO* c. 598 §2.

<sup>54</sup> JOHN PAUL II, m.p. *Ad tuendam fidem*, 18 May 1998, no. 3: [https://www.vatican.va/content/john-paul-ii/en/motu\\_proprio/documents/hf\\_jp-ii\\_motu-proprio\\_30061998\\_ad-tuendam-fidem.html](https://www.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_30061998_ad-tuendam-fidem.html)

<sup>55</sup> *CCC*, no. 2035: [https://www.vatican.va/archive/ENG0015/\\_P74.HTM](https://www.vatican.va/archive/ENG0015/_P74.HTM)

<sup>56</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction, *Donum veritatis*, On the Ecclesial Vocation of the Theologian, 24 May 1990, no. 23: [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19900524\\_theologian-vocation\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19900524_theologian-vocation_en.html)

have evolved fifteen “rites.”<sup>57</sup> The Byzantine tradition has been the seedbed of seven rites: Bulgarian, Georgian, Greek, Melkite, Rumanian, Ruthenian, and Slav. The Antiochian tradition embraces the Malankaran, Maronite, and Syrian rites, while from the Chaldean tradition arose the Chaldean and Syro-Malabar rites. The Alexandrian tradition gave rise to the Coptic and Ethiopian rites.<sup>58</sup>

As early as the fifth century, Christological disputes and political rivalries rent the fabric of Eastern Christianity. Affected by schism in this early period were the Churches of Armenia and Persia, along with parts of the Churches of Antioch, Alexandria, and Jerusalem.<sup>59</sup> The schism between the Eastern and Western Churches occurred in 1054 when the papal legates and the patriarch of Constantinople excommunicated each other, although Church unity had been seriously impaired even before this date. The Crusades and the sacking of Constantinople in 1204 confirmed the division in the minds of many Oriental Christians.<sup>60</sup> After 1054, there were various plans for a reunion of East and West. Notable were the Second Council of Lyons in 1274 and the Council of Florence in 1439.

In the sixteen and seventeenth centuries, various groups reunited with Rome, largely as a result of Latin missionary activity. At the same time, the concept of “rite” developed, according to which groups of Oriental Christians reuniting with the Roman See would be allowed to maintain their liturgical tradition and canonical discipline.<sup>61</sup> Presently, we divide the Oriental

<sup>57</sup> The word ‘rite’ has many meanings; here we are using ‘rite’ in the second sense of the term noted by G. Nedungatt: “[t]he word ‘rite’ [...] came [...] to designate any or all of the following three things: 1) liturgical ceremony; 2) a complex of liturgical ceremonies, customs and practices including canonical discipline; 3) the communities of faithful with or without their own hierarchy who were received into direct communion with Rome but with their own ‘rite’ in senses 1 and 2. Thus ‘rite’ underwent a sea change or metamorphosis from its original thing-status to person-status and caused no little confusion” (G. NEDUNGATT, *The Spirit of the Eastern Code*, Rome, Centre for Indian and Inter-Religious Studies, Bangalore, Dharmaram Publications, 1993, 64).

<sup>58</sup> We must note that, historically, all rites have been influenced by more than one tradition. There is no “pure” rite as such. For instance, in the way the Alexandrian tradition developed in Ethiopia, it was not free from Antiochene influence.

<sup>59</sup> These schisms, after the Councils of Ephesus (431) and Chalcedon (455), led to the formation of the so-called ‘Nestorian’ and ‘Monophysite’ Churches. See D. ATTWATER, *The Christian Churches of the East*, vol. 1, Milwaukee, WI, Bruce, 1947, 3-5.

<sup>60</sup> See ATTWATER, *The Christian Churches of the East*, vol. 1, 5-12.

<sup>61</sup> Till Vatican II, the overarching Catholic ecclesiology was that of “one Church” and thus usage shied away of speaking of these Oriental Catholic ‘unitiate’ communities as “Churches”: the term “rite” usually fulfilled that function. The concern of the Holy See to protect the Eastern communities from absorption into the Latin Church resulted in a praxis and law that



Churches into roughly four categories: the Assyrian Church of the East, the Oriental Orthodox Churches, Orthodox, and Catholic.<sup>62</sup> The Orthodox are the largest of the four communions of Oriental Churches, and this study will focus mostly on their tradition and practices.

## 2.1 — Development of Oriental Theology of Marriage

While not treating the Eastern Churches as a totality without differentiating between them, nonetheless we can still say that before and after the ecclesial schism of 1054, a uniquely Eastern theology of marriage had developed.<sup>63</sup>

### 2.1.1 — *Marriage as ‘mystery’*

The Eastern approach to the sacraments is different from that of the West. The Latin concentration on precision led to dividing the sacraments into essential and non-essential parts, while the Eastern Churches looked at the sacraments in their totality, insisting on the imperceptible facets of the “mysteries.”<sup>64</sup> St. Paul’s idea of the Church as the Bride of Christ exerted a greater

“personalised” rite. This was a post-Tridentine development. Today, in Catholic thinking, the word “Church” is preferred when speaking about autonomous communities belonging to one rite. This is seen in the *CCEO* where a Church *sui iuris* is defined as a group of Christian faithful united by a hierarchy according to the norm of law which the supreme authority of the Church expressly or tacitly recognises as *sui iuris* (c. 27), whereas a rite is the liturgical, theological, spiritual and disciplinary patrimony, distinct by virtue of the culture and historical circumstances of the people, by which its own manner of living the faith is manifested in each Church *sui iuris* (c. 28 § 1). So today we speak of five traditions, fifteen rites, and twenty-three Oriental Catholic Churches recognised by the Holy See as *sui iuris*.

<sup>62</sup> See R. ROBBERSON, *The Eastern Christian Churches: A Brief Survey*, 7<sup>th</sup> ed., Rome, Pontifical Oriental Institute, 2008 (available online: <https://cnewa.org/eastern-christian-churches>). Roberson’s approach of grouping Churches that are in full communion with one another, rather than categorizing them according to other criteria such as liturgical tradition, results in four distinct Eastern Christian communions: (1) the Assyrian Church of the East, which is not in communion with any other Church; (2) the six Oriental Orthodox Churches, which, even if each one is independent, are in full communion with one another; (3) the Orthodox Church, which is a communion of national or regional Churches, all of which in principle recognise the Patriarch of Constantinople as a point of unity enjoying certain rights and privileges; and (4) the Eastern Catholic Churches, all of which are in communion with Rome.

<sup>63</sup> See P. CONNOLLY, “Contrasts in the Western and Eastern Approaches to Marriage,” in *StC*, 35 (2001), 367-372.

<sup>64</sup> For some Eastern theological reflection on marriage, see J. MEYENDORFF, *Marriage: An Orthodox Perspective*, 3<sup>rd</sup> revised ed. (4<sup>th</sup> printing), Crestwood, NY, St. Vladimir’s Seminary Press, 2000; P. EVDOKIMOV, *The Sacrament of Love: The Nuptial Mystery in the Light of*

influence in the East, and the Oriental theology of marriage was inspired by the notion of *henosis* (the communion of Christ with his Church), as related in the Letter to the Ephesians (5:22-32). In the theology of marriage of the Eastern traditions, the point of departure is not the natural human reality of marriage but the supernatural union that it images: marriage is an icon of the Kingdom.<sup>65</sup>

Three important ideas underlie the Eastern notions of marriage: God's creation and His blessing of man and woman (Gn 1:27, 2:24; Mt 19:4); the spouses' new life in Christ; and the couple's sharing in the life of the Church, the Body of Christ. Marriage is a mystery of the Kingdom of God, whereby husband and wife not only fulfil their own earthly needs but also somehow enter the realm of eternal life. According to St. John Chrysostom in the fourth century, in married love there is a remnant of Paradise, even after the Fall.<sup>66</sup> Marriage is above all a gift of God, redeemed by Christ, and lived out in the life of the Church. The Oriental Churches, from early on, looked upon the mutual consent of the Christian couple as a spiritual act, rather than as a legal one. Later on, when the time arrived to list the sacraments, the East had no difficulty in acknowledging marriage as one of them.<sup>67</sup>

### 2.1.2 — *Matthew's Gospel and oikonomia*

A significant difference arose between East and West on the indissolubility of consummated Christian marriage. In the East, the passage from Matthew's Gospel had a profound influence: "Have you not read that he who made them from the beginning made them male and female ...?" (19:4).<sup>68</sup> In an eschatological perspective, this was seen as promoting perfect and perpetual monogamy as the norm for marriage, so that in some sense true married love transcended even death. Remarriage for widowers and widows

*the Orthodox Tradition*, Crestwood, NY, St. Vladimir's Seminary Press, 1985; T. STYLIANOPOULOS, "Toward a Theology of Marriage in the Orthodox Church," in *Greek Orthodox Theological Review*, 22 (1977), 249-283.

<sup>65</sup> See A. SCHMEMMANN, "The Indissolubility of Marriage: The Theological Tradition of the East," in W.W. BASSETT (ed.), *The Bond of Marriage*, Notre Dame, IN, University of Notre Dame Press, 1968, 111.

<sup>66</sup> See ST. JOHN CHRYSOSTOM, *De libello repudii*, in *PG*, vol. 51, col. 221.

<sup>67</sup> See J. ZHISHMAN, *Das Eherecht der orientalischen Kirche*, Vienna, W. Braumüller, 1864, 124-132 (= ZHISHMAN, *Das Eherecht der orientalischen Kirche*). This mammoth work by a nineteenth century Orthodox canonist remains a valuable resource for the study of marriage in the Byzantine Churches.

<sup>68</sup> See J.H. ERICKSON, *The Challenge of Our Past: Studies in Orthodox Canon Law and Church History*, Crestwood, NY, St Vladimir's Seminary Press, 1991, 41-42.

was held in low esteem by Eastern Christians, who regarded it as a concession to human weakness, not marriage as it had been established “from the beginning.” Initially, such marriages were not given the nuptial blessing.

Moreover, Matthew 19:4 was seen in the context of the exceptive clause in Mt 19:8-9, “whoever divorces his wife, except for sexual immorality (*porneia*), and marries another, commits adultery.”<sup>69</sup> While the interpretation of the “exceptive” clauses in Matthew 19:9 and 5:32 (especially the meaning of *porneia* in that context) is still much debated, the Eastern traditions have generally understood the word to mean “adultery.” The Orthodox canonist and historian J.H. Erickson claims: “For the East generally, the Matthean exceptive clause is understood not as a derogation from the prohibition to divorce but as its logical corollary. Adultery is the antithesis of marriage as it was established ‘from the beginning’: the perpetual union in love of one man and one woman.”<sup>70</sup> Historically, the Byzantine and other Oriental Churches have admitted remarriage after divorce by interpreting Matthew 19:9 and 5:32 in a broad sense.

Often, appeal continues to be made to the principle of *oikonomìa*, whereby the Church, as the dispenser of the graces of Christ in the sacraments, claims the power to admit of exceptions in the law of indissolubility, with a sense of “elasticity” arising out of solicitude for human frailty, while upholding the fundamental principle. With the death of one of the spouses or because circumstances make marital life impossible, the Orthodox tradition appeals to *oikonomìa* and concedes an ecclesiastical divorce as the lesser evil. In Orthodox thought, there is always a dialectic between *oikonomìa* and *akribia* (faithfulness to revealed truth, strictness in Church practice, firm application of canon law).<sup>71</sup> However, *oikonomìa* is understood in different senses by various Orthodox scholars.<sup>72</sup>

<sup>69</sup> See A.L. DESCHAMPS, “The New Testament Doctrine on Marriage,” in CONNERY and R. MALONE (eds.), *Contemporary Perspectives*, 217-273.

<sup>70</sup> ERICKSON, *The Challenge of Our Past*, 43.

<sup>71</sup> For a good description of this dialectic, see K. SCHEMBRI, “The Orthodox Tradition on Divorced and Remarried Faithful: What Can the Catholic Church Learn?” in *Melita Theologica*, 65 (2015), 127-129.

<sup>72</sup> See F.J. THOMAS, “Economy: An Examination of the Various Theories of Economy Held within the Orthodox Church with Special Reference to the Economical Recognition of the Validity of Non-Orthodox Sacraments,” in *Journal of Theological Studies*, 16 (1965), 368-420. See also J.H. ERICKSON, “Sacramental ‘Economy’ in Recent Roman Catholic Thought,” in *J*, 48 (1988), 653-667; IDEM, *The Challenge of Our Past*, 115-129; IDEM, “*Oikonomìa* in Byzantine Canon Law,” in K. PENNINGTON and R. SOMERVILLE (eds.), *Law, Church, and Society: Essays in Honor of Stephan Kuttner*, Philadelphia, PA, University of Pennsylvania Press, 1977, 225-236.

Furthermore, there are limits to the application of *oikonomìa* to marriage, especially in regards to the clergy. In the Orthodox tradition, monks and clergy are called to be “perfect” Christians, summoned to a “higher state.” Divorced remarried men or men who have married a divorced woman cannot receive ordination, and an ordained man who divorces his wife cannot continue in ministry. Clerics and their wives cannot remarry following the death of their spouses, because they are required to abide by *akribia*.<sup>73</sup> For the laity generally, however, even a third marriage is permissible though highly discouraged, though the Orthodox interpretation of *oikonomìa* will not extend to the possibility of blessing a fourth marriage.

## 2.2 — Influence of Civil Law upon Eastern Doctrine and Ecclesiastical Law?

Adultery was not the only grounds for divorce eventually accepted by many Oriental Churches; other reasons were assimilated to adultery and considered equally grave. The general trend of the Oriental canonical tradition became clear: while remarriage after divorce was discouraged, just as any remarriage was, return to Communion was possible for the remarried in certain circumstances, even for the guilty party after a severe penance. This was true for both the Byzantine and non-Byzantine Churches.<sup>74</sup> However, it does seem the Oriental Orthodox Churches and the Assyrian Church of the East are much stricter, and their practices remain more linked to the ground of adultery.<sup>75</sup>

As an example, let us look at the Byzantine Churches. Although the Eastern ecclesial mindset disliked all remarriage, a grave conundrum arose in the

<sup>73</sup> See P. VISCUSO, “The Prohibition of Second Marriage for Women Married to Priests,” in *Orientalia Christiana Periodica*, 66 (2000), 441-448.

<sup>74</sup> For a historical summary of the divorce legislation of the Oriental Churches, see J. DAUVILLIER and C. DE CLERCQ, *Le mariage en droit canonique oriental*, Paris, Recueil Sirey, 1936, 84-95 (Byzantine Churches), 96-102 (‘Nestorian’), 102-104 (Syrian Jacobite), 105-107 (Maronite), 107-110 (Coptic ‘Monophysite’), 110-116 (Armenian), 116-122 (Ethiopian ‘Monophysite’). See also M. JUGIE, art. “Mariage dans l’Église gréco-russe,” in *Dictionnaire de théologie catholique*, t. 9, pars 2, Paris, Letouzey et Ané, 1927, cols. 2323-2328; IDEM, art. “Mariage dans l’Église nestorienne et les Églises monophysites,” in *ibid.*, cols. 2331-2335.

<sup>75</sup> See L. LORUSSO and G.M. GALLARO, “Divorced and Remarried in the Eastern Orthodox Churches,” in *StC*, 50 (2016), 498-499. See also Coptic Pope SHENOUDA III, “Marriage, Politics and Jerusalem,” in *Al-Ahram Weekly*, no. 423, 1-7 April 1999: <https://web.archive.org/web/20090313094405/http://weekly.ahram.org.eg/1999/423/intr-view.htm>

Byzantine Empire when, in the ninth century, the Emperor gave the Church a monopoly in marriage matters. In contrast to the West, in the Orient the marriage liturgy had been made obligatory early on. The role of nuptial rites and the priest had developed even earlier in the non-Byzantine Churches than in the Greek Church. To be married in a religious rite was a canonical obligation in Armenia in the fifth century.<sup>76</sup> Over time in the Byzantine Empire, between the eighth and eleventh centuries, the State made the liturgical celebration a condition of validity. This development culminated in the famous *Novella* 89 of the Emperor Leo VI, issued around 893, which required the sacerdotal blessing for marriage, under pain of nullity.<sup>77</sup> This gave legal support to the prevalent habit of couples receiving the blessing,<sup>78</sup> and though this was a civil sanction, it was recognised as ecclesiastical law.<sup>79</sup> There is evidence to show that, even prior to the enactment of Leo VI, many Byzantine Christians considered nuptials celebrated without the blessing of a priest invalid.<sup>80</sup> This view was also recognised by the non-Byzantine Churches.<sup>81</sup>

However, this historical development meant that the distinction between marriages living up to the Byzantine Church's norm and those tolerated as a concession to human weakness became blurred, since the Church had to bless the second and third marriages of the widowed and divorced, who previously would have undergone a different civil ceremony.<sup>82</sup> The Church ended up having to bless marriages which involved a period of exclusion from the Divine Mysteries for the spouses. Consequently, there developed a distinct liturgy for second marriages, penitential in character, and only the

<sup>76</sup> See A. SADKOWSKI, "Le sacrement du mariage dans l'Église orthodoxe," in *INTAMS*, 11 (2005), 264-265; K. RITZER, *Le mariage dans les Églises chrétiennes du I<sup>er</sup> au XI<sup>e</sup> siècle*, Paris, Cerf, 1970, 144-145, 172; J. PRADER, *Il matrimonio in Oriente e in Occidente*, *Kanonika* series, vol. 1, Rome, Pontificio Istituto Orientale, 1992, 196-198.

<sup>77</sup> *Novella* 89 did not apply to serfs; in 1095, Emperor Alexios I gave slaves the right of getting lawfully married, which meant that the sacerdotal blessing was henceforth required for all marriages.

<sup>78</sup> See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, 158-159.

<sup>79</sup> See P. TOCANEL, "De Novellae 89 Leonis Philosophi canonizatione," in *Ap*, 42 (1969), 21-36; P. L'HUILLIER, "Novella 89 of Leo the Wise on Marriage: An Insight into its Theoretical and Practical Impact," in *Greek Orthodox Theological Review*, 32 (1987), 153-162.

<sup>80</sup> See H. BENEDETTI, "Votum II," in *ASS*, 41 (1908), 256.

<sup>81</sup> See *ibid.*, 257-258. See also PRADER, *Il matrimonio in Oriente e in Occidente*, 196-198.

<sup>82</sup> However, already in the period before *Novella* 89, there is evidence that second and even third marriages were occasionally blessed at the imperial court, because it seems clergy were not always able to resist pressure from the imperial family. In 795 a major controversy ensued when Emperor Constantine VI had his second marriage blessed at the Hagia Sophia Church; the Patriarch had declined to celebrate the marriage himself but did not discipline the officiating priest, and that provoked a virulent protest from the famous monk St. Theodore the Studite who got flogged and exiled as a result.

first marriage was seen to be fully sacramental.<sup>83</sup> Yet, in practice, the difference between the two types of marriage often was forgotten.<sup>84</sup> Another factor was that by 1086 ecclesiastical tribunals received exclusive competence for the examination of marriage cases, meaning that the Church had to conform its practices to imperial legislation. With this new social responsibility, the Church was obliged not only to bless marriages of which it did not approve, but even to effectively give “divorces” and practically abandon its penitential discipline.

However, the Byzantine Church did uphold indissolubility as the norm and was very opposed to the Roman law concept of divorce by simple mutual consent. For the Church, divorce was unacceptable without a valid reason. In this matter, appeal was made to the Council in Trullo and to St. Basil. Despite this ecclesiastical opposition, divorce by mutual consent lingered for a long time in the Byzantine Empire.<sup>85</sup> The “valid reasons” in civil law were eventually reduced to two acceptable to the Church: those which could be assimilated to death, implying no culpability (e.g., a spouse disappeared and presumed dead, lasting madness, entry into monastic life, elevation to the episcopate, etc), and those which could be compared to adultery and deserving of punishment (e.g., putting the spouse’s life in danger, abortion, making the spouse work as a prostitute, etc).<sup>86</sup> Because of the civil restrictions placed on divorce from Christian influence, the divorce rate was lower during the Byzantine Middle Ages than during late antiquity.<sup>87</sup>

We know that the grounds for divorce specified in Byzantine civil law were often clearer than those in canon law, because the Patriarchs sometimes contradicted each other.<sup>88</sup> In allowing divorce for causes other than adultery and the blessing of remarriage in certain cases, Byzantine canonists later sought support in the texts of canon 87 of Trullo, the forty-eighth Apostolic canon, canon eight of Neocaesarea, and the ninth canon of St. Basil. For instance, the famous twelfth century Byzantine canonists, Balsamon, Zonaras, and Aristenos, deduced from these texts that there were other grounds

<sup>83</sup> See A. PALMIERI, “The Second Marriage Service in the Orthodox Church,” in *INTAMS*, 14 (2008), 170-180. The status in Orthodox thought of second and third marriages does not lend itself easily to more precise Catholic theological and canonical categories.

<sup>84</sup> See ERICKSON, *The Challenge of Our Past*, 47; MEYENDORFF, *Marriage: An Orthodox Perspective*, 24-29, 44-47.

<sup>85</sup> See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, 101-107.

<sup>86</sup> See *ibid.*, 118-119.

<sup>87</sup> See P. L’HUIILLIER, “The Indissolubility of Marriage in Orthodox Law and Practice,” in *St. Vladimir’s Theological Quarterly*, 32 (1988), 212.

<sup>88</sup> See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, 117-118.

for divorce besides adultery.<sup>89</sup> The interpretation of these canons has been disputed for a long time, and a major problem was that these canonists appealed to the civil law of the emperors to clear up doubts about the meaning of the canons.<sup>90</sup>

Hence, the question arises of whether the Byzantine Church admitted of and then justified divorce for numerous causes to adapt itself to imperial laws. This has been argued cogently both before and since Vatican II.<sup>91</sup> In this view, the Byzantine Church became the guarantor of marriage as a social institution and had to conform its practices to civil legislation. The successive spread of Christianity from Constantinople to other missionary territories and nations brought about the geographical extension of the disciplinary practices of this tradition as well as the dissemination of the theological principles that upheld such practices. This explains why the diverse Orthodox Churches nevertheless follow most of the same theological and disciplinary principles on remarriage. Some scholars hold that, of all the Eastern Churches, the Byzantine Church's law was the most inclined to multiply the reasons justifying divorce and remarriage because of its close interaction with civil law, and because the Matthean text was not seen as the only basis for divorce.<sup>92</sup> More generally, such Catholic critics see Eastern practices as

<sup>89</sup> See *ibid.*, 107-110. For the nineteenth century Roman Curia's view of the 48<sup>th</sup> Apostolic canon and canon 9 of St. Basil, see S.C. DE PROPAGANDA FIDE, Instruction to the Greek Rumanians, *Difficile actu*, 1858, in *Fontes*, vol. 7, no. 4842, 352-353. On the explanation of some controversial ancient canons, see J. PAPP-SZILÁGYI, *Enchiridion juris Ecclesiae orientalis catholicae*, M.-Varadini, Typis A. Tichy, 1862, 487-498; he was a Byzantine Rumanian Catholic canonist, though of a certain Latin outlook. See also D. SALACHAS, *Il diritto canonico delle Chiese orientali nel primo millennio: confronti con il diritto canonico attuale delle Chiese orientali cattoliche (CCEO)*, Rome-Bologna, Edizioni Dehoniane, 1997, 272-276.

<sup>90</sup> See ZHISHMAN, *Das Eherecht der orientalischen Kirche*, 110-111.

<sup>91</sup> See C. VASIL', "Separation, Divorce, Dissolution of the Bond, and Remarriage: Theological and Practical Approaches of the Orthodox Churches," in R. DODARO (ed.), *Remaining in the Truth of Christ: Marriage and Communion in the Catholic Church*, San Francisco, CA, Ignatius Press, 2014, 93-127.

<sup>92</sup> Among those who hold that divorce entered the Byzantine Church through the civil law were Dauvillier and De Clercq: "L'Église byzantine est, des Églises orientales, celle qui a admis rapidement les causes les plus nombreuses. En effet, jamais l'Église byzantine n'a considéré le texte de Saint Mathieu comme contenant la cause exclusive du divorce; elle y a vu l'application à titre d'exemple des causes qu'admettait le droit civil. Car c'est par le droit civil que le divorce est entré dans l'Église byzantine. Cela s'explique par le dépendance que l'évêque de Constantinople, qui doit l'importance de son siège au voisinage du Basileus, manifeste vis-à-vis du pouvoir séculier. Et des empereurs émane une législation très abondante à l'égard du divorce, dans laquelle se manifestent des tendances contradictoires" (DAUVILLIER and DE CLERCQ, *Le mariage en droit canonique oriental*, 85). See also JOYCE,



resulting from a complex historical process—a progressively more liberal interpretation of some obscure patristic texts, greatly influenced by civil law and societal mores, and increasingly removed from the radical teaching of the New Testament. This view was summed up in 1999 by the then Cardinal J. Ratzinger.

In the Imperial Church after Constantine, with the ever stronger interplay between Church and State, a greater flexibility and readiness for compromise in difficult marital situations was sought. Up until the Gregorian reform, a similar tendency was present in Gallic and Germanic lands. In the Eastern churches separated from Rome, this development progressed farther in the second millennium and led to an increasingly more liberal praxis. Today in some of these churches there are numerous grounds for divorce, even a theology of divorce, which is in no way compatible with Jesus' words regarding the indissolubility of marriage.<sup>93</sup>

Many Orthodox Christians reject this historical critique and maintain that Orthodoxy is continuing a custom dating back to Origen, St. John Chrysostom, and St. Basil.<sup>94</sup> In other words, Orthodox practice does not originate in the Emperor Justinian's law of 542, but this law put into writing previous practices already upheld by the Church. There is little doubt that the Orthodox position relies on the interpretation of several Church Fathers and local Councils, a controversial issue upon which much scholarly ink has been spilled. For instance, regarding St. Basil, H. Crouzel has been critical of some post-Vatican II Catholic authors: "... they treat Basil's Canonical Letters as if they contained general rules, whereas the author is responding to specific, particular cases that were submitted to his judgment by Amphilocheus of Iconium. If we consider their original intent, they would be

*Christian Marriage*, 359-376; P. ADNÈS, *Le mariage*, Tournai, Desclée, 1963, 64; JUGIE, art. "Mariage dans l'Église gréco-russe," cols. 2323-2328.

<sup>93</sup> RATZINGER, "Introduzione":

[https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19980101\\_ratzinger-comm-divorced\\_en.html#\\_ftn1](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19980101_ratzinger-comm-divorced_en.html#_ftn1). In two essays, in 1972 and 1999, Ratzinger goes over much the same material, but by 1999 he is more sceptical of what can be learned from the East and from analysing some early patristic and conciliar texts. Cf. J. RATZINGER, "Zur Frage nach der Unauflöslichkeit der Ehe: Bemerkungen zum dogmengeschichtlichen Befund und zu seiner gegenwärtigen Bedeutung," in F. HENRICH and V. EID (eds.), *Ehe und Ehescheidung: Diskussion unter Christen*, Munich, Kösel-Verlag, 1972, 35-56, English translation by J. Bolin: "On the Question of the Indissolubility of Marriage: Remarks on the Dogmatic-Historical State of Affairs and Its Significance for the Present," [www.pathsoflove.com/texts/ratzinger-indissolubility-marriage](http://www.pathsoflove.com/texts/ratzinger-indissolubility-marriage); J. RATZINGER, "À propos de la pastorale des divorcés remariés," in *DC*, 4 April 1999, no. 2201, 316-325.

<sup>94</sup> For example, see L'HUILLIER, "The Indissolubility of Marriage in Orthodox Law and Practice," 208-210.



closer to a manual of cases of conscience, foreign to the usage that the Byzantine canonists made of them.”<sup>95</sup>

Nonetheless, J. Erickson points out that the Byzantines always had an ideal of a “symphony” between *imperium* and *sacerdotium*, that the Byzantine Church did constantly resist “divorce by mutual consent” and attempted to reduce divorce by trying to “Christianise” lax civil legislation.<sup>96</sup> That acknowledged, it is hard to argue that the link with the State was not hugely influential on the development of the Church’s own doctrine and laws on remarriage.

Certain stances of the Eastern Churches certainly arose partly out a specific historical background of Church-State relations. For instance, it is sometimes said of the Orthodox Church that “it blesses the first marriage, performs the second, tolerates the third, and forbids the fourth.” So why in Orthodoxy is there now a maximum of three marriages allowed in church? Theologically speaking, this limit may be seen to be rooted in the preaching of St. Gregory of Nazianzus who considered the first marriage as the rule, the second as a concession, the third as a transgression, and anything beyond the third as belonging to swine.<sup>97</sup> However, this upper limit might also be ascribed to historical accident, as in practice it arose from the dispute in the tenth century about the fourth marriage of the Byzantine Emperor Leo VI, who had been married three times and whose spouses had died in succession with no surviving offspring. Since his third marriage had been frowned upon by the Church, Leo then took a mistress and married her only after she had given birth to a son, but this fourth marriage incurred the outright opposition of the Patriarch Nicholas I Mystikos. By replacing him as Patriarch with Euthymios in 907, Leo got his marriage recognised by the Church.<sup>98</sup> With the accession of Leo VI’s brother Alexander to the throne in 912, Nicholas was restored to the Patriarchate and a struggle with the followers of

<sup>95</sup> H. CROUZEL, “Divorce and Remarriage in the Early Church: Some Reflections on Historical Methodology,” in *Communio*, English edition, 41 (2014), 501. This article is a translation of “Divorce et remariage dans l’Église primitive,” in *Nouvelle Revue Théologique*, 98 (1976), 891-917.

<sup>96</sup> See ERICKSON, *The Challenge of Our Past*, 46-47.

<sup>97</sup> See GREGORY OF NAZIANZUS, *Oratio* 37:8, in *PG*, vol. 36, col. 292. It may be that Gregory was not giving permissions for divorce and remarriage but attempting to curtail subsequent unions, as he was likely preaching before the Theodosian court in Constantinople to change the lax laws on marriage of the Empire. His intention may be clarified by his Epistle 144, wherein he called divorce completely disagreeable with the ecclesiastical law, even if Roman law said otherwise.

<sup>98</sup> Leo undertook a long penance and made a pledge that he would proscribe all future fourth marriages. See W. TREADGOLD, *A History of the Byzantine State and Society*, Stanford, CA, Stanford University Press, 1997, 468.

Euthymios ensued, which did not end until the new Emperor Romanos I Lekapenos promulgated the *Tome of the Union of 920*, wherein the Byzantine Empire and Church confirmed the ban on fourth marriages and placed strict limitations on those entering a third union.<sup>99</sup> Specific historical decisions arising from the close interaction between Church and State, but regarded as binding, seem to be justified by Orthodoxy through an interpretation of *oikonomia* which validates these numbers.

Another example of the influence of imperial law is that most of the Orthodox canonical grounds of divorce find their root in the *Novella 117* promulgated by the Emperor Justinian in 542, which were accepted into the Church's legislation in 883 by Patriarch Photios I in his *Nomocanon in Fourteen Titles*.<sup>100</sup> While this collection did confirm the indissolubility of marriage, it also provided the list of reasons for divorce introduced by Justinian's legislation. That list has been adapted and the number and type of grounds of divorce do vary from one Orthodox Church to another. All grounds, by way of *oikonomia*, remain connected to three Biblical categories that mean an end to the marriage relationship: death (1 Cor 7:39), adultery (Mt 5:32, 19:9), and iniquity (1 Cor 6:5-10).<sup>101</sup> While all Orthodox bishops and authors recognise the indissolubility of Christian marriage and teach this doctrine as the ideal toward which couples must aim and see divorce and remarriage as the exception that confirms the rule of indissolubility, it is not feasible to speak of a common procedure or agreed grounds at the real-world level. Arriving at definite conclusions about procedures is difficult because of the great diversity of practice.<sup>102</sup> Part of the problem in evaluating procedures for divorce in the Orthodox Churches is that there usually is not much beyond application forms and various directives.<sup>103</sup> The distinction between "guilty" and "innocent" parties has now often disappeared, with both allowed a new marriage in church, and many Orthodox Churches do little

<sup>99</sup> Meyendorff holds this *Tome* to be the most solemn collection of laws accepted by both Church and Empire governing successive marriages: J. MEYENDORFF, "Christian Marriage in Byzantium: The Canonical and Liturgical Tradition," in *Dumbarton Oaks Papers*, 44 (1990), 102.

<sup>100</sup> See LORUSSO and GALLARO, "Divorced and Remarried in the Eastern Orthodox Churches," 490-491.

<sup>101</sup> See G.M. GALLARO, "Christian *oikonomia* Revisited," in *StC*, 48 (2014), 162-163.

<sup>102</sup> For a good overview of many of these issues, see J.D FARIS, "Marriage in the Eastern and Western Churches," in *CLSAP*, 77 (2015), 42-72.

<sup>103</sup> See, for instance, the study of one particular Orthodox jurisdiction: P. VISCUSO, "Divorce in the Greek Orthodox Archdiocese of North and South America," in *J*, 50 (1990), 322-341.

more than simply ratify divorce sentences issued by the civil courts or recognise them implicitly, though that is not everywhere the case.<sup>104</sup>

On the other hand, some Orthodox authors and bishops are opponents of easy ecclesiastical divorce. Certain Orthodox thinkers conclude that the Byzantine Church was forced by the historical circumstances of its connection with the Empire to accommodate itself to the demands of society in the matter of divorce and should now bar the remarriage in church of “guilty parties.”<sup>105</sup> Others feel that the Orthodox Church needs to abandon formally granting “ecclesiastical divorces,” giving the liturgical blessing only in the case of “innocent parties.”<sup>106</sup> In a similar vein, the distinguished Orthodox theologian J. Meyendorff suggested the Church stop “giving divorces” but issue “permissions to remarry” after civil divorce, which would require counseling and investigation that reconciliation is not possible. This “permission” would entail some form of penance tailored to each case and would give the right to the blessing according to the rite of second marriage.<sup>107</sup>

Since Vatican II, many Catholic scholars have been inclined to take a more positive view of Eastern practices on remarriage. However, they do not engage directly with the criticism that current Eastern practices are more historically rooted in civil law than in the New Testament or in the practice of the early Church.<sup>108</sup>

### 2.3 — Indissolubility and Communion with the Roman See

Well before the schism of 1054, Oriental practices on remarriage were considerably different from those of the Western Church. This also applied to Eastern Churches not in the sphere of Byzantine ecclesiastical influence.<sup>109</sup> The Latin Church seemed aware of the Oriental practices, yet it was not a major bone of contention. Nonetheless, Rome later engaged in a long struggle against tolerating the remarriage of divorced persons in the Oriental

<sup>104</sup> See LORUSSO and GALLARO, “Divorced and Remarried in the Eastern Orthodox Churches,” 491, 499, 502; GALLARO, “Christian *oikonomia* Revisited,” 165-166.

<sup>105</sup> See A.N. SMIRENSKY, “The Evolution of the Present Rite of Matrimony and Parallel Canonical Developments,” in *St. Vladimir’s Seminary Quarterly*, 8 (1964), 42-47.

<sup>106</sup> See E. MELIA, “Le lien matrimonial à la lumière de la théologie sacramentaire et de la théologie morale de l’Église orthodoxe,” in R. METZ and J. SCHLICK (eds.), *Le lien matrimonial*, Strasbourg, CERDIC, 1970, 190-197.

<sup>107</sup> See MEYENDORFF, *Marriage: An Orthodox Perspective*, 58.

<sup>108</sup> See, for instance, CORIDEN and HIMES, “The Indissolubility of Marriage: Reasons to Reconsider,” 472-473.

<sup>109</sup> For an account of the practices of the non-Byzantine Churches, see DAUVILLIER and DE CLERCQ, *Le mariage en droit canonique oriental*, 96-122.

Catholic Churches when they reunited with the Holy See, a struggle which lasted up to the last half of the nineteenth century.<sup>110</sup> This saga is an example of where the imposition of disciplinary law itself helps illuminate doctrinal principles.

In 1595, the Ukrainian Catholic Church was formed as a result of the Union of Brest. In 1646, at the Union of Užhorod, the Ruthenians under Hungarian rule established communion with the Holy See. At other times, other Oriental Catholic patriarchs were recognised by Rome, such as the Chaldean Patriarch (1553), the Syrian Patriarch (1656), the Melkite Patriarch (1729), the Armenian Patriarch (1742), and the Coptic Patriarch (1899). Eventually sections of virtually all the Eastern Churches came into communion with the Roman See.<sup>111</sup>

We must bear in mind that divorce and remarriage was not an urgent pastoral problem, and communication with Rome was not always easy. Nevertheless, the papal attitude was clear. For example, in 1595, in an Instruction to the Byzantine Italians, Pope Clement VIII declared that the remarriage of divorced persons could in no way be permitted and such marriages were null and void.<sup>112</sup> This statement was repeated in 1742 by Benedict XIV in his Constitution *Etsi pastoralis*.<sup>113</sup>

It is important to note that remarriage after divorce was considered to be contrary to Catholic doctrine, not just opposed to a disciplinary law of the Church.<sup>114</sup> This is indicated in the way that indissolubility came to be

<sup>110</sup> For a historical account of the relationship between Rome and the Oriental Catholics concerning indissolubility, see L. BRESSAN, *Il divorzio nelle Chiese orientali: ricerca storica sull'atteggiamento cattolico*, Bologna, Edizioni Dehoniane, 1976, 123-218.

<sup>111</sup> For a contemporary report on the Eastern Catholic Churches, see ROBERSON, *The Eastern Christian Churches*: <https://cnewa.org/eastern-christian-churches>. This valuable book also has a description of all the non-Catholic Eastern Churches.

<sup>112</sup> “Matrimonia inter coniuges Graecos dirimi, seu divortia quoad vinculum fieri nullo modo permittant, aut patiantur, et si qua de facto processerunt, nulla, et irrita declarent” (CLEMENT VIII, Instruction to the Byzantine Italians, *Sanctissimus*, §5, 31 August 1595, in *Fontes*, vol. 1, no. 179, 345).

<sup>113</sup> See BENEDICT XIV, Constitution *Etsi pastoralis*, §8:2, 26 May 1742, in *Fontes*, vol. 1, no. 328, 749.

<sup>114</sup> See Bressan's conclusion on Roman Congregations' struggle against remarriage among Oriental Catholics: “La Santa Sede cioè è sempre stata unanimemente contraria all'ammissione del divorzio fra cristiani, ed ha raccomandato agli stessi prelati di rito orientale ed ai missionari inviati in quelle regioni di abolirne l'uso dove esisteva. Questo atteggiamento era motivato dalla convinzione che la prassi cattolica si basava sul vangelo ed era quindi immutabile e valida per tutte le chiese. I testi considerati non sono infatti favorevoli all'ipotesi secondo cui la Santa Sede non avrebbe ammesso il divorzio in oriente unicamente perché non riconosceva l'autorità di quei vescovi di dispensare dal vincolo coniugale. Il problema

explicitly included in the Professions of Faith prescribed for Oriental Christians coming into communion with the Roman See, although this explicit statement was not always insisted upon.<sup>115</sup> The article in the *Professio orthodoxae fidei ab Orientalibus facienda* issued by Pope Urban VIII in the seventeenth century became widely used, though not exclusively, for reunions with Eastern Christians: “[I hold] also that the bond of the sacrament of marriage is indissoluble, and that although the spouses can separate from bed and board on account of adultery, heresy and other causes, another marriage may not however be contracted by them.”<sup>116</sup> This is a general assertion of the indissolubility of Christian marriage; it does not distinguish between consummated sacramental marriages and unconsummated sacramental marriages and says nothing about purely natural marriages; it seems to refer to intrinsic indissolubility.<sup>117</sup> This declaration was later included, for example, in the eighteenth-century Profession of Faith prescribed for the Maronites by Benedict XIV.<sup>118</sup>

In the mid-nineteenth century, there was a dispute between Rome and the Catholic Byzantine bishops in Transylvania concerning remarriage practices among the Byzantine Rumanian Catholics. The bishops appealed for their

non era infatti discusso a Roma sotto l'aspetto giuridico di competenze, ma è stato considerato sotto l'aspetto teologica-morale dell'indissolubilità in sé e della relativa dottrina evangelica” (BRESSAN, *Il divorzio nelle Chiese orientali*, 220).

<sup>115</sup> For an analysis of how indissolubility was treated in the various Professions of Faith laid down by Rome for Oriental Christians, see *ibid.*, 123-157. On the fact that indissolubility was not mentioned explicitly in every Profession, Bressan makes the perceptive comment: “[...] la chiesa romana non sempre ha chiesto la ammissione esplicita dell'assoluta indissolubilità del matrimonio cristiano come una delle verità da accogliere necessariamente per essere in unione con la chiesa. Assai spesso però questa dichiarazione è stata domandata negli ultimi secoli, e quando il problema è emerso in trattative d'unione, come nel caso citato dei nestoriani, la risposta della santa sede è stata decisamente contrario al divorzio. Le omissioni quindi nelle Professioni di fede di un articolo sull'indissolubilità del matrimonio non sembrano indicare che si ritenesse come liberamente discutibile la dottrina relativa, vanno collocate nelle circostanze storiche, ed indicano un metodo con cui si è fatta l'unione” (*ibid.*, 155-156).

<sup>116</sup> URBAN VIII, *Professio orthodoxae fidei ab Orientalibus facienda*, circa 1644, no. 22, in *Iuris Pontificii de Propaganda Fide*, cura ac studio R. DE MARTINIS, vol. 1, Rome, ex typographia polyglotta S.C. de Propaganda Fide, 1888, 231: “[Pariter veneror, et suscipio Tridentinam Synodum, et profiteor, quae in ea definita et declarata sunt, et praesertim ...] Item sacramenti matrimonii vinculum indissolubile esse, et quamvis propter adulterium, haeresim, aut alias causas possit inter coniuges thori et cohabitationis separatio fieri, non tamen illis aliud matrimonium contrahere fas esse.”

<sup>117</sup> See BRESSAN, *Il divorzio nelle Chiese orientali*, 145.

<sup>118</sup> See BENEDICT XIV, Letter to the Maronites, *Nuper ad Nos*, §5:2, 16 March 1743, in *Fontes*, vol. 1, no. 335, 786.

discipline to be left alone, arguing that Trent had not settled the matter.<sup>119</sup> In 1858, Propaganda Fide issued a detailed instruction, explaining that this was impossible, since it was not a matter of Oriental discipline but of Catholic doctrine.<sup>120</sup> The next year, Pius IX explicitly told the bishops that the indissolubility of consummated Christian marriage did not have its origin in ecclesiastical discipline; the Pope went so far as to say that it concerned a question of divinely revealed truth.<sup>121</sup> Furthermore, in 1883, the Holy Office, in an wide-ranging instruction on matrimonial law sent to all the Eastern Catholic bishops, reminded them that it was Catholic doctrine that the valid consummated marriage of the baptised cannot be dissolved, except through the death of one of the spouses.<sup>122</sup>

To sum up, after the Council of Trent, the popes kept insisting that the Catholic teaching on indissolubility be obeyed among Oriental Catholics, until the law against remarriage was observed throughout the Catholic Church in both East and West. When, in 1949, Pius XII promulgated the *motu proprio Crebrae allatae*, a marriage law for all the Oriental Catholic Churches, it reflected this stance.<sup>123</sup> The teaching that a valid consummated Christian marriage can never be dissolved except by death was found in canon 107 of *Crebrae allatae*, an exact repetition of canon 1118 of the 1917 Latin Code, except for a comma. Interestingly, while canon 99 of *Crebrae allatae* was an exact replica of the 1917 Latin canon 1110 (on the perpetual and exclusive bond arising from a valid marriage), its *fontes* included ancient Eastern texts concerned with combatting adultery, desertion, and remarriage.<sup>124</sup> As previously noted, after Vatican II, because it was regarded as a doctrinal matter, indissolubility received little attention during the revision process of the *CCEO*, so the 1990 Oriental Code basically repeats the previous legislation relative to indissolubility.

<sup>119</sup> For an account of this dialogue, see BRESSAN, *Il divorzio nelle Chiese orientali*, 197-218.

<sup>120</sup> See S.C. DE PROPAGANDA FIDE, Instruction to the Greek Rumanian Bishops, *Difficile actu*, 1858, in *Fontes*, vol. 7, no. 4842, 350-358.

<sup>121</sup> See PIUS IX, *Verbis exprimere*, 15 August 1859, in *Fontes*, vol. 2, no. 526, 928-931; *Papal Teachings: Matrimony*, 111-112.

<sup>122</sup> See S. C. S. OFFICIUM, *Instr. ad Ep. Rituum Orient.*, 1883, pars II, art. 4, no. 42, in *Fontes*, vol. 4, no. 1076, 405. See also the concern of Propaganda Fide that "Nestorians" reuniting with Rome should be instructed in this doctrine: S. C. DE PROPAGANDA FIDE, Instruction, §1(f), 31 July 1902, in *Fontes*, vol. 7, no. 4940, 545.

<sup>123</sup> See PIUS XII, m.p. *Crebrae allatae*, 22 February 1949, in AAS, 41 (1949), 89-119.

<sup>124</sup> See *Fonti orientale*, Series I, fac. IX, 399-409: "[...] — Syn. Gangren., a. 340-376, can. 14; Syn. Carthaginen., a. 419, can. 105; Syn. Trullan., a. 691, can. 87, 93; S. Basilus M., can. 9, 46, 48, 77; Timotheus Alexandrin., interrog. 15." The construal of some of these texts, imposing penalties for remarriage, has been long debated in regard to indissolubility.

### *Conclusion*

The stances on indissolubility of the Catholic Church and the non-Catholic Eastern Churches arose and evolved in different historical contexts. Both hold that the New Testament teaches a challenging and radical doctrine, and both affirm the Biblical principle of indissolubility. Yet, both read the Scriptures in a very different way, and both have developed contrasting ecclesiastical laws and practices. While historical analysis demonstrates that development took place regarding the Catholic Church's consciousness of its authority over marriage, once the principle was arrived at that a consummated sacramental marriage could never be dissolved except by death, there has been no wavering from that principle. The Catholic Church has maintained a sustained effort to be faithful to the revolutionary nature of the New Testament teaching both in doctrine and in ecclesiastical practice. It is obvious that at the foundation of Magisterial caution about further development of the settled Catholic doctrine and practice is a concern that it would lead towards a situation whereby no category of marriage would be absolutely indissoluble. This would be contrary to what the Church has always taught and believes to be in fidelity to Christ's radical teaching.

Even if the general councils of the West, considered ecumenical by Catholicism, have carefully avoided an explicit rejection of Eastern doctrines or practices permitting a second marriage after divorce, the problem remains that such practices cannot be reconciled with Catholic doctrine. While the other Councils and Trent did not explicitly condemn the practice of second marriages in church, they were always regarded by the Catholic Church as an abuse, and Eastern Churches coming into communion with the Roman See were required to renounce the practice. Besides, the origin of many of these practices seems to lie fundamentally in the "symphony" between *imperium* and *sacerdotium*, between the civil and canon law. The least that can be said is that this "symphony" led in practice to the multiplication of the grounds justifying widespread ecclesiastical divorce, which led to stances which are hardly coherent with the Biblical texts on indissolubility, whatever might remain the theological and spiritual stance on indissolubility. In the Orthodox Churches, what has shifted from the first millennium is that what was supposed to be the marginal possibility of ecclesiastical divorce has become standard practice, thereby creating the danger of obscuring the doctrine.

In summary, given the reliance on disputed patristic texts and the historical complexities and even contradictions in how Eastern practices developed in blessing second and third marriages, it remains unclear what the Catholic

Church can learn from such practices. The Catholic Church still faces a grave pastoral crisis regarding divorce, but attention might better be focused on the notions of *consummatum* and *sacramentum*, even if they offer no easy solutions.



## **RESPONSE OF THE HOLY SEE TO THE AUSTRALIAN ROYAL COMMISSION *FINAL REPORT***

BRENDAN PETER DALY

**SUMMARY** — The final report of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse in 2017 commented on the lack of responsibility, transparency, and accountability within the Catholic Church’s practices and law. The Commissioners made twenty-one recommendations; the Australian Catholic Bishops Conference accepted all of them, except one concerning the seal of confession. The recommendations concerning universal law were forwarded to the Holy See, which responded on 26 February 2020. The author explains the origins of the recommendations and comments on the responses of the Holy See to each recommendation.

**RÉSUMÉ** — Le rapport final de la Australian Royal Commission into Institutional Responses to Child Sexual Abuse en 2017 a commenté le manque de responsabilité, de transparence et d’obligation de rendre des comptes au sein des pratiques et du droit de l’Église catholique. Les commissaires ont formulé vingt et une recommandations ; la Australian Conference of Catholic Bishops les a toutes acceptées, sauf une concernant le sceau de la confession. Les recommandations concernant le droit universel ont été transmises au Saint-Siège, qui a répondu le 26 février 2020. L’auteur explique les origines des recommandations et commente les réponses du Saint-Siège à chaque recommandation.

### ***Introduction***

The Royal Commission into Institutional Responses to Child Sexual Abuse in Australia (= the “Royal Commission”) made a thorough study of sexual abuse within the Australian Catholic Church. The Royal Commission’s 2017 final report, in sixteen volumes, details the extent of this abuse within the Catholic Church and the catastrophic failure of bishops and religious superiors to deal with the perpetrators, to protect victims and

potential victims, and to prevent abuse.<sup>1</sup> These revelations have had a huge impact on the Catholic Church and its reputation. It is obvious that the Church in Australia cannot continue to operate as it has in the past. The gravity of the abuse revelations resulted in extensive recommendations by the Commission on 15 December 2017. The Australian Catholic Bishops Conference accepted all the recommendations, except one concerning the seal of confession. On accepting the recommendations, the Australian Catholic Bishops Conference forwarded the recommendations involving universal canon law to the Holy See. The Holy See responded on 26 February 2020.<sup>2</sup>

This study is divided into three parts according to the tenor of the Holy See's responses as being (1) predominantly acceptable recommendations, (2) predominantly unacceptable recommendations, and (3) other recommendations. The issues considered in the responses are treated by first giving the recommendation of the Royal Commission, then the response to it of the Holy See, followed by a commentary on the response.

## 1 — *Predominantly Acceptable Recommendations*

The Vatican responses in this first category show that the Holy See is generally supportive of the recommendations in substance. These responses for the most part indicate that the Holy See has already addressed the issue satisfactorily, is still studying the matter, and/or intends to make further progress.

### 1.1 — Selection of Bishops

The Royal Commission made recommendations concerning the selection of bishops, due to catastrophic failures of episcopal leadership.

#### 1.1.1 — *Royal Commission Recommendation 16.8*

*In the interests of child safety and improved institutional responses to child sexual abuse, the Australian Catholic Bishops Conference should request the Holy See to: (a) publish criteria for the selection of bishops, including*

<sup>1</sup> THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, *Final Report*, 2017, [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_16\\_religious\\_institutions\\_book\\_1.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_16_religious_institutions_book_1.pdf) (= RCIRCSA, *Final Report*).

<sup>2</sup> HOLY SEE, "Observations of the Holy See," Prot. No. 484.110, in "Responses to Australia's Royal Commission on Child Sexual Abuse," in *Origins*, vol. 50, no. 17 (2020), 271-276 (= HOLY SEE, *Observations of the Holy See*).

*relating to the promotion of child safety; (b) establish a transparent process for appointing bishops which includes the direct participation of lay people.*

### 1.1.2 — *Response of the Holy See*

The Holy See, in various published sources, has set forth the process followed in the selection and appointment of candidates for the episcopal office. In particular, canons 377 and 378 of the Code of Canon Law (CIC) offer a summary of the nomination process and of the qualities required of candidates. The Apostolic Letter *motu proprio* of Pope St. Paul VI, *Sollicitudo omnium ecclesiarum* (1969) and the Decree *Episcoporum delectum*, with its accompanying norms (1972), which are still in force, outline in some detail the informative process undertaken by Pontifical Representatives in relation to the nomination of bishops. As a normal part of that process, lay men and women, together with clerics, are regularly consulted. Moreover, the questionnaires used in collecting information about potential candidates have included, for the past several years, questions specific to the safeguarding of minors.

At the same time, it should be noted that the procedure for nominating bishops is carried out with a certain discretion out of respect for the candidates, who, after all, do not put themselves forward, and in order to allow the persons consulted to answer with the greatest possible candour and freedom.

Finally, the Holy See acknowledges that, as with all procedures, improvements can always be made, especially in the light of experience. In that context, the Holy See shares the concern of the Royal Commission that the question of child safety be given due consideration in the process for identifying candidates and naming bishops.

### 1.1.3 — *Commentary*

Massive failures in episcopal leadership have been exposed around the world.<sup>3</sup> This raises the question whether a different process for their selection would be a preventative measure. Normatively, “the supreme pontiff freely appoints bishops or confirms those legitimately elected” (c. 377 § 1). However, there are exceptions in some places (e.g., Vietnam, China, and Chur in Switzerland). It has been suggested by some canonists that there could be much more involvement by the faithful in this process. This could take the

<sup>3</sup> T. PAPROCKI, “Confronting the Myths and Realities of Clerical Sexual Abuse of Minors in the Catholic Church,” *StC*, 53 (2019), 606 (= PAPROCKI, “Confronting the Myths and Realities of Clerical Sexual Abuse of Minors in the Catholic Church”).

form of proposing a list of candidates from which the pope makes the final choice. Alternatively, local Church representatives could have a right of veto.<sup>4</sup>

Canon 378 enumerates the required qualities in candidates for the episcopacy. However, Torfs has pointed out that the job description of a bishop has changed, and this needs to be reflected in the qualities required of episcopal candidates. Bishops need to be people with moral courage, who can make the right decisions in difficult situations.<sup>5</sup> A respectable but lenient churchman, intent primarily on maintaining the reputation of the Church, could be a liability when dealing with a clerical abuser.

The Royal Commission recommended a governance review of the Church in Australia. Subsequently, the Australian Catholic Bishops Conference and Catholic Religious Australia appointed a group to conduct it. The appointment process for bishops was also addressed by the governance report on the Catholic Church in Australia in *The Light of the Southern Cross*.<sup>6</sup> This latter report notes how confidence and trust in Church governance and episcopal leadership had been undermined. It suggests that the processes leading to the appointment of bishops by the pope be explained on the Australian Bishops Conference website. The report recommends that the consultative process for episcopal appointments be more transparent and effective.<sup>7</sup> The governance review also recommends wider consultation with laity during the appointment process, as well as ensuring that candidates for the episcopacy have proven competence in dealing with sexual abuse cases.

## 1.2 — Pontifical Secret

The Royal Commission received many complaints concerning pontifical secrecy. The use of the word “secret” causes confusion for victims and others.

<sup>4</sup> R. TORFS, “Canon Law and the Recommendations of the Royal Commission,” in S. CRITENDEN (ed.), *Health and Integrity in Church and Ministry*, Melbourne, 2019, 88 (= TORFS, “Canon Law and the Recommendations of the Royal Commission”).

<sup>5</sup> Ibid., 89.

<sup>6</sup> IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*, <https://static1.squarespace.com/static/5acea6725417fc059ddcc33f/t/5f3f79e41aac2871be0fba5c/1597995610389/The+Light+from+the+Southern+Cross+FINAL+%2815+August+2020%29.pdf> (= IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*).

<sup>7</sup> Ibid.

### 1.2.1 — *Royal Commission Recommendation 16.10*

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law so that the pontifical secret does not apply to any aspect of allegations or canonical disciplinary processes relating to child sexual abuse.*

### 1.2.2 — *Response of the Holy See*

The Holy See also welcomes this recommendation. During the meeting on “The Protection of Minors in the Church” held in the Vatican from 21 to 24 February 2019, with the participation of the Presidents of all the national Episcopal Conferences and representatives of a number of Major Superiors of the Institutes of Consecrated Life and Societies of Apostolic Life, considerable attention was given to the question of the confidentiality of canonical processes. During the meeting it was acknowledged that, although the scope of the Pontifical Secret has always been to protect the parties involved and to avoid unnecessary and harmful publicity around delicate cases, under the current circumstances it has frequently become a source of misunderstanding.

Consequently, with the Instruction “On the Confidentiality of Legal Proceedings” of 6 December 2019, the Holy Father removed from the ambit of the Pontifical Secret accusations, canonical processes and decisions in cases concerning the sexual abuse of minors and vulnerable persons, and the possession of pornographic material involving minors.

It should be noted that all those charged with conducting canonical penal processes will continue to observe an appropriate level of confidentiality related to the discharge of their office. However, such official confidentiality does not constitute an obstacle to the fulfilment of any reporting obligations under civil laws nor to the execution of enforceable requests of civil judicial authorities.

### 1.2.3 — *Commentary*

Pope Francis dealt with this recommendation of the Royal Commission on 6 December 2019 by promulgating a rescript and an instruction on the confidentiality of cases.<sup>8</sup> This enables jurisprudence of the Congregation for the Doctrine of the Faith to be published.

<sup>8</sup> FRANCIS, Rescriptum ex audientia SS.mi, 6 December 2019, [http://www.vatican.va/roman\\_curia/secretariat\\_state/2019/documents/rc-seg-st-20191206\\_rescriptum\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2019/documents/rc-seg-st-20191206_rescriptum_en.html): “3. In the cases referred to in no. 1, the information is to be treated in such a way as to ensure its security, integrity and confidentiality in accordance with the prescriptions of

### 1.3 — Penal Law Reform

The Royal Commission exposed serious gaps in canonical legislation concerning sexual abuse of minors and called for a reform of penal law.

#### 1.3.1 — *Royal Commission Recommendation 16.9*

*The Australian Catholic Bishops Conference should request the Holy See to amend the 1983 Code of Canon Law to create a new canon or series of canons specifically relating to child sexual abuse, as follows: (a) All delicts relating to child sexual abuse should be articulated as canonical crimes against the child, not as moral failings or as breaches of the ‘special obligation’ of clerics and religious to observe celibacy. (b) All delicts relating to child sexual abuse should apply to any person holding a ‘dignity, office or responsibility in the Church’ regardless of whether they are ordained or not ordained. (c) In relation to the acquisition, possession, or distribution of pornographic images, the delict (currently contained in Article 6 §2 1° of the revised 2010 norms attached to the motu proprio Sacramentorum sanctitatis tutela) should be amended to refer to minors under the age of 18, not minors under the age of 14.*

#### 1.3.2 — *Response of the Holy See*

The Holy See welcomes this recommendation, which has been taken into account in the current process of review of the canonical penal legislation, both general (Book VI of the Code of Canon Law) and specific (Norms of the Congregation for the Doctrine of the Faith). Indeed, a number of recent decisions have already addressed, at least in part, the issues raised in the recommendation.

The Apostolic Letter *motu proprio* of Pope Francis, *Vos estis lux mundi*, of 7 May 2019, requires Dioceses and Eparchies to establish permanent mechanisms for receiving reports of sexual abuse against minors and vulnerable adults, when committed not only by clerics but by non-clerical members of Institutes of Consecrated Life and Societies of Apostolic Life, who may also be subject to penalties. Moreover article 1, §1 of *Vos estis lux*

canons 471, 2° CIC and 244 §2, 2° CCEO, for the sake of protecting the good name, image and privacy of all persons involved.

4. Office confidentiality shall not prevent the fulfilment of the obligations laid down in all places by civil laws, including any reporting obligations, and the execution of enforceable requests of civil judicial authorities.

5. The person who files the report, the person who alleges to have been harmed and the witnesses shall not be bound by any obligation of silence with regard to matters involving the case.”

*mundi* describes these crimes as offenses against minors and vulnerable persons, rather than as breaches of the special obligations of clerics.

Regarding offenses related to child pornography, the same Letter, *Vos estis lux mundi*, defines a minor as one under the age of 18 (Article 1, §2). In addition, the *Rescriptum ex Audientia SS.mi*, dated 3 December 2019, which updated some of the Norms accompanying *Sacramentorum sanctitatis tutela* (SST), modified the offenses relative to child pornography contained in Article 6 §1, 2°, to make punishable under Canon Law “the acquisition, possession or distribution of pornographic images of minors under the age of eighteen.” This decision entered into force on January 1<sup>st</sup>, 2020.

### 1.3.3 — Commentary

Many civil jurisdictions around the world have precise legislation for the protection of children. Any person who violates any of these prescriptions cannot work with children. Unfortunately, canon law currently does not adequately protect children. This is both because of the seriousness of the sexual act that must be committed before it becomes a canonical crime, as well as the fact that one must be a cleric for the act to be considered a delict. In marked contrast, the 1917 Code excluded laymen from exercising any responsibility in the Church who were guilty of the rape of girls,<sup>9</sup> while canon 2357 made laity guilty of sexual abuse of a minor liable for other penalties.<sup>10</sup> As an increasing number of lay people are employed by the Church, people reasonably expect that they will be subject to ecclesiastical penalties for sexual abuse of a minor. The Final Report notes the finding that, within the Catholic Church, perpetrators of sexual abuse were thirty-seven percent non-ordained religious (thirty-two percent religious brothers and five percent religious sisters); thirty percent were priests; and twenty-nine percent were lay people.<sup>11</sup> Consequences could be legislated for lay employees who have abused a minor, including immediate termination of employment,

<sup>9</sup> *CIC/17*, c. 2354 §1. A layman who was legitimately convicted of the delict of homicide, rape of a youth of the opposite sex ... is by the law itself considered as excluded from legitimate ecclesiastical acts and from any responsibility, if he had any in the Church, with the obligation of repairing the damage that remains. Translation by E. PETERS, *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001. All translations of the 1917 Code hereinafter are from this source.

<sup>10</sup> *CIC/17*, c. 2357 §1. Laity legitimately convicted of a delict against the sixth [commandment of the Decalogue] with a minor below the age of sixteen, or of debauchery, sodomy, incest, or pandering, are by that fact infamous, besides other penalties that the Ordinary decides should be inflicted.

<sup>11</sup> RCIRCSA, *Final Report*.

a perpetual ban against being employed by a Catholic organisation or institution, an irregularity for ordination, or automatic excommunication.

One way that the Church ensures the dignity of sacred orders is by establishing irregularities for ordination. Cappello defines “an irregularity as a perpetual impediment, established by ecclesiastical law out of reverence of the divine ministry, prohibiting primarily the reception of orders, and secondarily the exercise of orders received.”<sup>12</sup> Even if the ordinand is unaware that he has an irregularity, he is bound by the irregularity when he learns it has been incurred. This is different from a crime, in that a person ignorant of the law without negligence is not subject to a penalty (c. 1323, 2°). Sexual abuse of minors needs to be made an irregularity to prevent someone who has committed sexual abuse from being ordained or exercising ministry. A dispensation from an irregularity can only be granted by the Holy See, so a diocesan bishop or religious ordinary cannot address the matter alone.

Pope Francis has now addressed the recommendation by promulgating a new canon 1398 covering the delict of sexual abuse of minors in the section of the Book VI entitled *Offences against Human Life, Dignity and Liberty*.<sup>13</sup> The delict applies to all clergy, religious brothers and sisters and lay people holding offices in the Church. The delict in relation to pornography refers to minors under the age of eighteen years.

## 1.4 — Publication of Penal Sentences

It was obvious to the Royal Commission that bishops, religious superiors, and canon lawyers in Australia were unsure of jurisprudence in regard to sexual abuse cases. The Commission saw the great need for decisions to be published.

### 1.4.1 — Royal Commission Recommendation 16.16

*The Australian Catholic Bishops Conference should request the Holy See to introduce measures to ensure that Vatican Congregations and canonical appeal courts always publish decisions in disciplinary matters relating to*

<sup>12</sup> F.M. CAPPELLO, *Tractatus canonico-moralis de Sacramentis*, vol. 2, Rome, 1935, 416: “Irregularitas est impedimentum perpetuum, iure ecclesiastico propter reverentiam divini ministerii constitutum, prohibens primario suceptionem ordinis et secundario exercitium ordinum susceptorum.”

<sup>13</sup> FRANCIS, constitutio apostolica qua Liber VI Codicis iuris canonici reformatur *Pascite gregem Dei*, 23 May 2021, [https://www.vatican.va/content/francesco/la/apost\\_constitutions/documents/papa-francesco\\_costituzione-ap\\_20210523\\_pascite-gregem-dei.html](https://www.vatican.va/content/francesco/la/apost_constitutions/documents/papa-francesco_costituzione-ap_20210523_pascite-gregem-dei.html) (= FRANCIS, *CIC*, 2021).



*child sexual abuse, and provide written reasons for their decisions. Publication should occur in a timely manner. In some cases, it may be appropriate to suppress information that might lead to the identification of a victim.*

#### **1.4.2 — Response of the Holy See**

The present Recommendation is related to the question of the Pontifical Secret already mentioned in Recommendation 16.10. As noted there, the Instruction of December 6<sup>th</sup>, 2019 has amended the dispositions concerning the Pontifical Secret, which now does not apply to accusations, processes and decisions involving cases related to child sexual abuse. However, as the Recommendation itself recognises, the publication of decisions in individual cases needs to be evaluated in light of the duty to protect the good name, image and privacy of all persons involved including, in particular, that of the victims. In the future, such evaluations will be made in light of the abovementioned Instruction.

#### **1.4.3 — Commentary**

The response of the Holy See is cautious. No commitment is made about publishing decisions and making jurisprudence available. However, following publication of the Final Report of the Royal Commission, the Congregation for the Doctrine of the Faith issued the *Vademecum: on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*.<sup>14</sup> This gives practical advice for the handling of these cases.

## **2 — Predominantly Unacceptable Recommendations**

In these predominately unacceptable recommendations, the Holy See does not reject the recommendations outright. Instead, the response is a polite affirmation of whatever good may be salvaged in the recommendation while not accepting it. These responses implicitly express a basic disagreement with the recommendations.

<sup>14</sup> CONGREGATION OF THE DOCTRINE OF THE FAITH (CDF), *Vademecum: on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20200716\\_vademecum-casi-abuso\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html); hereinafter all quotes from the *Vademecum* are taken from this source.

## 2.1 — Abolition of Prescription for the Crime of Sexual Abuse

The data about the complainants of the Catholic Church show that the length of time between the first incident of abuse and a victim reporting it was, on average, thirty-three years.<sup>15</sup> This delay has complicated bringing the perpetrators to justice; yet, according to the Royal Commission's final report, a priority of victims is to prevent others from being abused.<sup>16</sup> Prescription in canon law is similar to the statute of limitations in the civil law (common law). The two are often confused with one another but, as Austin explains, they can be clearly distinguished.<sup>17</sup> A criminal cause for action no longer exists when prescription applies. With a statute of limitations, the criminal cause for action still exists, but the offender can no longer be prosecuted because of the passage of time. Prescription, he says, is in fact a matter of substantive law because, with the passage of time, often there is a weakening of the proofs and a loss of witnesses.<sup>18</sup>

### 2.1.1 — Royal Commission Recommendation 16.12

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to remove the time limit (prescription) for commencement of canonical actions relating to child sexual abuse. This amendment should apply retrospectively.*

### 2.1.2 — Response of the Holy See

The recommendation deals with a question that has been the subject of considerable review in recent years. Already in 2001, changes were made to the legislation contained in the Code of Canon Law when *Sacramentorum sanctitatis tutela* (SST) extended the period of prescription for the crimes in

<sup>15</sup> RCIRCSA, *Final Report*.

<sup>16</sup> "We were told that many survivors disclosed because they wanted the abuse to stop or wanted to prevent it happening to others. Other survivors disclosed because they could no longer carry the burden of the secrecy of sexual abuse. Disclosing early can immediately commence the important process of ensuring safety and protection for victims, taking steps to ensure the abuse is stopped and reducing risk to other potential victims. Disclosure is important for victims as well as the institutions involved, other children and the broader community. Disclosure is rarely a one-off event, and is a process. Victims will disclose in different ways to different people throughout their lives. Disclosures may be verbal or non-verbal, accidental or intentional, partial or complete." RCIRCSA, *Final Report*.

<sup>17</sup> B.T. AUSTIN, "Due Process of Law and the USCCB Essential Norms," in *StC*, 51 (2017), 70-71 (= AUSTIN, "Due Process of Law and the USCCB Essential Norms").

<sup>18</sup> *Ibid.*, 66.

question to 10 years. In the 2010 revision of SST, the period of prescription was increased to 20 years, which runs from the victim's 18th birthday. In addition, the Congregation for the Doctrine of the Faith was granted the faculty to derogate from prescription on a case-by-case basis, a faculty that the Congregation continues to use whenever appropriate.

It should be kept in mind, nonetheless, that the institution of prescription is of ancient origin, in both canonical and civil systems. Its outright abolition could, in fact, result in difficulties for the proper administration of justice since the fallibility of memory with the passage of time and the lack of proofs concerning events from the distant past make it difficult to reach the level of certainty required in criminal proceedings.

### 2.1.3 — *Commentary*

In 2001, Pope John Paul II promulgated the motu proprio *Sacramentorum sanctitatis tutela* (SST).<sup>19</sup> This universal law lists the sexual abuse of a minor under eighteen years of age committed by a cleric as one of the *delicta graviora* reserved to the Congregation for the Doctrine of the Faith.<sup>20</sup> Prescription for this delict was fixed at ten years, beginning at the completion of the eighteenth year of the victim.<sup>21</sup> Now, prescription does not apply for sexual abuse of a minor until twenty years after the victim has reached the age of eighteen (SST, art. 7).

The Royal Commission recommended that the law be changed to eliminate prescription in cases of the sexual abuse of minors, and that this change apply retroactively. However, as Austin points out, *ex post facto* laws are contrary to the natural law.<sup>22</sup> The 1948 *Universal Declaration of Human Rights* states: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."<sup>23</sup>

<sup>19</sup> JOHN PAUL II, Apostolic Letter m.p. *Sacramentorum sanctitatis tutela*, 30 April 2001, in AAS, 93 (2001), 737-739.

<sup>20</sup> CDF, Circular Letter, 3 May 2011, in AAS, 103 (2011), 406-412.

<sup>21</sup> Msgr. Charles Scicluna asserted that it would be preferable to have no prescription for crimes of sexual abuse of minors. C. SCICLUNA, "The Procedure and Praxis of the Congregation for the Doctrine of the Faith regarding *Graviora Delicta*," [http://www.vatican.va/resources/resources\\_mons-scicluna-graviora-delicta\\_en.html](http://www.vatican.va/resources/resources_mons-scicluna-graviora-delicta_en.html) (= SCICLUNA, "The Procedure and Praxis of the CDF").

<sup>22</sup> AUSTIN, "Due Process of Law and the USCCB Essential Norms", 73.

<sup>23</sup> THE UNITED NATIONS, *Universal Declaration of Human Rights*, Article 11, [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

There have been inconsistencies in how canonical penalties and prescription have applied to clergy and lay religious brothers and sisters.<sup>24</sup> There is an administrative process for members of religious institutes for the dismissal of a member from the religious institute.<sup>25</sup> Pope Francis has clarified the law on prescription in canon 1362 of the revised penal law, but prescription is retained for sexual abuse crimes according to the special norms for offences reserved to the Congregation for the Doctrine of the Faith.<sup>26</sup> While a dispensation from prescription is not possible, one can receive a derogation. A dispensation relaxes the law, while a derogation means that the law does not apply in a particular case.<sup>27</sup> Only the Congregation for the Doctrine of the Faith has the faculty to derogate from prescription.

## 2.2 — The “Balance of Probabilities” and the “Canonization” of Criminal Convictions

All legal systems have standards of proof that a judge or jury must arrive at in order to decide an accused is guilty of a crime. The Royal Commission recommended a lower standard of proof for sexual abuse crimes. It also recommended obligatory dismissal from the clerical state or from a religious institute for convicted offenders.

### 2.2.1 — Royal Commission Recommendation 16.14

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to give effect to Recommendations 16.55 and 16.56.*

*Recommendation 16.55. Any person in religious ministry who is the subject of a complaint of child sexual abuse which is substantiated on the balance of probabilities, having regard to the principles in Briginshaw v Briginshaw, or who is convicted of an offence relating to child sexual abuse, should*

<sup>24</sup> Canon 1362 § 1. Prescription extinguishes a criminal action after three years unless it concerns: 1) delicts reserved to the Congregation for the Doctrine of the Faith; 2) an action arising from the delicts mentioned in canons 1394, 1395, 1397, and 1398, which have a prescription of five years; 3) delicts which are not punished in the common law if particular law has established another period for prescription.

<sup>25</sup> Canon 695 § 1. A member must be dismissed for the delicts mentioned in canons 1397, 1398, and 1395, unless in the delicts mentioned in can. 1395 § 2, the superior decides that dismissal is not completely necessary and that correction of the member, restitution of justice, and reparation of scandal can be resolved sufficiently in another way.

<sup>26</sup> FRANCIS, *CIC*, 2021.

<sup>27</sup> See C.G. RENATI, “Prescription and Derogation from Prescription in Sexual Abuse of Minors Cases,” in *Jur*, 67 (2007), 503 (= RENATI, “Prescription and Derogation”); and P. BROWN, “Prescription and Statutes of Limitation,” in *CLSAP*, 70 (2008), 384.

*be permanently removed from ministry. Religious institutions should also take all necessary steps to effectively prohibit the person from in any way holding himself or herself out as being a person with religious authority.*

*Recommendation 16.56. Any person in religious ministry who is convicted of an offence relating to child sexual abuse should: a. in the case of Catholic priests and religious, be dismissed from the priesthood and/or dispensed from his or her vows as a religious.*

### **2.2.2 — Response of the Holy See**

The Holy See has long insisted that “there is no place in the priesthood and religious life for those who would harm the young” (St John Paul II, Address to the Cardinals of the United States, 23 April 2002). At the same time, such a position does not exclude the right to a fair and impartial trial, nor to the presumption of innocence, nor does it dispense from the principles of legality and proportionality between the crime and the penalty. It is worth recalling that the sexual abuse of minors is a crime in both civil and canon law.

The civil and criminal responsibility of individuals who perpetrate that crime is a matter for the laws of the State where the crime is committed. Focusing on the ecclesial aspect of the crime, Canon Law seeks to punish the wrongdoer for the grievous harm he has caused and to protect the faithful from further damage. At the same time, it cannot be indifferent to the sinner’s conversion, since it has as a fundamental goal the salvation of souls.

Regarding the standard for conviction in a judicial process, the long tradition of canonical reflection on vital jurisprudential principles, as embodied in the Codes of Canon Law, requires of the judge “moral certainty” in coming to a decision. Such moral certainty is derived from the acts and the proofs of the case (CIC, can. 1608; CCEO can. 1291). The principle of moral certainty gives expression to the need to respect both the presumption of innocence and the ancient legal maxim *in dubio pro reo*.

As for those who are dismissed from the clerical state or from their religious institute, they are explicitly forbidden to present themselves as clerics or to act in any ministerial role.

### **2.2.3 — Commentary**

The “balance of probabilities” is the standard of proof necessary to prove civil cases in common law countries. “Absolute certainty” excludes any possibility of doubt, while at the other extreme a “semblance of truth” means that the accusation seems to be true. The jurisprudence of the common law legal system requires a judge or jury to be convinced of the defendant’s guilt *beyond reasonable doubt* to convict. If a reasonable doubt exists, the accused must be acquitted. Henry Chambers explains: “If trial evidence affords any reasonable possibility of the defendant’s innocence that cannot be explained

away by additional evidence or inferences from additional evidence, a juror cannot be sufficiently certain of the defendant's guilt to convict under the reasonable doubt standard.<sup>28</sup> Sometimes decisions must be made concerning compensation for victims when the accused is deceased. In these circumstances, it is reasonable to make decisions based on a "balance of probabilities."

The concept of moral certainty arose because Christians have been conscious of the injunction in Matthew 7:1 "Do not judge, so that you may not be judged." Being involved in convicting an innocent person was considered a mortal sin. Therefore, from the 1780s, the level of certitude required to convict was moral certainty, so that the accused was acquitted if there were reasonable doubts.<sup>29</sup> Secular jurisprudence used the non-theological language of "beyond reasonable doubt," rather than the theological language of moral certainty.

Moral certainty is the standard of proof in the Catholic Church for all procedures, including criminal cases. The *motu proprio* *Mitis Iudex Dominus Iesus* explains: "To achieve the moral certainty required by law, a preponderance of proofs and indications is not sufficient, but it is required that any prudent doubt of making an error, in law or fact, is excluded, even if the mere possibility of the contrary is not removed."<sup>30</sup>

In a canonical case of an Australian priest, an archbishop stated in his decree that the criteria of proof to be applied were the "balance of probabilities" and "unacceptable risk." Not surprisingly, the Congregation for Clergy found that these criteria were foreign to canon law and its processes, from which no dispensation is possible.<sup>31</sup> The standard of proof in ecclesiastical cases is moral certainty (canon 1608 § 1). The judge is to be morally certain in his mind that the defendant is guilty in order to convict him of the crime. There is the maxim "the accused is innocent until proven guilty" in "The Declaration of Rights" from the time of the French Revolution.<sup>32</sup> On the other hand, according to canon 1321, if it is proven that

<sup>28</sup> H. CHAMBERS, "Reasonable Certainty and Reasonable Doubt," in *Marquette Law Review*, 81 (1998), 655, 671.

<sup>29</sup> J. WHITMAN, *The Origins of Reasonable Doubt*, New Haven/London, Yale University Press, 2008, 2-3.

<sup>30</sup> FRANCIS, Apostolic Letter m.p. *Mitis Iudex Dominus Iesus*, 15 August 2015, in *AAS*, 107 (2015), 958-970, art. 12; *RR* 2016, 39.

<sup>31</sup> CONGREGATION FOR THE CLERGY, 21 December 2000, Prot. No. 2000/1201. See <http://web-mail.aol.com/msgview.adp?folder=UkVBRA==&uid=3084679>.

<sup>32</sup> Canons 220; 1321 § 3; 1728 § 2; cf. K. PENNINGTON, "Innocent until Proven Guilty: The Origins of a Legal Maxim," in *Jur*, 63 (2003), 106-124.

the accused committed the action, the presumption of the law is that the accused is culpable.

Judith Hahn believes that the notions of “moral certainty” and “beyond reasonable doubt” can be understood as equivalents.<sup>33</sup> The judge overcomes reasonable doubt when he reaches moral certainty. This moral certitude excludes all other reasonable possibilities. Pope Pius XII taught in a 1942 Rotal Allocution: “Sometimes moral certainty does not result except from a number of clues and proofs, which, taken individually, are not valid to found a true certainty, and only together do they no longer allow any reasonable doubt to arise for a man of sound judgment.”<sup>34</sup> The Holy See has rightly upheld the standard of proof of moral certainty for proof of accusations against priests. Priests have the right to justice like every other citizen. In the past some priests were not convicted of crimes as they should have been, but that does not now justify lower standards of proof in cases involving priests. The Cardinal Pell case and the quashing of his conviction in Australia illustrate the importance of standards of proof and presumptions of innocence.

Rik Torfs and John Beal question whether all clerical offenders should be dismissed from the clerical state.<sup>35</sup> The reality is that bishops and religious superiors often have little capacity to really supervise and control convicted offenders when they come out of prison. The Church does not have the systems and technology to control their internet use, where they go, or who they see. Dioceses and religious institutes need to utilise all the help that the civil justice system provides. There needs to be very detailed precepts given to offenders released from prison, and these precepts need to be enforced with clear consequences concerning accommodation and any financial support. Pope Francis has changed canon 1350 so that the Ordinary is not to confer “an office, ministry or function” on someone dismissed from the clerical state, and lay employees and ministers can now be punished for any sexual abuse crime.<sup>36</sup>

<sup>33</sup> J. HAHN, “Moral Certitude: Merits and Demerits of the Standard of Proof Applied in Roman Catholic Jurisprudence,” in *Oxford Journal of Law and Religion*, vol. 8, no. 2 (June 2019), 300-325.

<sup>34</sup> PIUS XII, 1 October 1942, Address to the Rota, [https://www.vatican.va/content/pius-xii/it/speeches/1942/documents/hf\\_p-xii\\_spe\\_19421001\\_roman-rotam.html](https://www.vatican.va/content/pius-xii/it/speeches/1942/documents/hf_p-xii_spe_19421001_roman-rotam.html).

<sup>35</sup> J. BEAL, “At the Crossroads of Two Laws. Some Reflections on the Influence of Secular Law on the Church’s Response to Clergy Sexual Abuse in the United States,” in R. TORFS (ed.), *Canon Law and Realism, Monsignor W. Onclin Chair 2000*, Leuven, Peeters, 2000, 51-74; TORFS, “Canon Law and the Recommendations of the Royal Commission,” 83.

<sup>36</sup> FRANCIS, *CIC*, 2021.

In the revised penal law, grooming is now a delict according to canon 1398 §2. This is a big step forward, although the meaning of “grooming” will have to be clarified in jurisprudence or another canonical document.<sup>37</sup> A repeat offence of grooming should result in dismissal from the clerical state and/or from the religious institute.

## 2.3 — Retention of Criminal Conviction Case Files

The Royal Commission encountered the destruction of documents many times during its investigations. Sometimes attempts were made to justify this for canonical reasons.

### 2.3.1 — *Royal Commission Recommendation 16.17*

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to remove the requirement to destroy documents relating to canonical criminal cases in matters of morals, where the accused cleric has died or ten years have elapsed from the condemnatory sentence. In order to allow for delayed disclosure of abuse by victims and to take account of the limitation periods for civil actions for child sexual abuse, the minimum requirement for retention of records in the secret archives should be at least 45 years.*

### 2.3.2 — *Response of the Holy See*

The Holy See notes that this recommendation needs to be considered in light of the requirements set forth by the civil law in various jurisdictions regarding both the preservation of archives and the right to privacy of the various persons concerned. Since such requirements are frequently divergent and at times even contradictory across different jurisdictions, the approach proposed by the Royal Commission might not be practicable in all cases.

Moreover, it should be noted that the scope of the current legislation applies to all “criminal cases in matters of morals” and not simply to cases involving clerics (CIC, can. 489; CCEO, can. 259). The provision concerning the destruction of documents applies only in cases “where the guilty parties have died or ten years have elapsed from the condemnatory sentence,” that is, only in those cases that have already been concluded with the sentence of a tribunal or that are extinguished by death. It should also be noted that even when documentation is destroyed, “a brief summary of what

<sup>37</sup> Ibid.



occurred along with the text of the definitive sentence is to be retained” (CIC, can. 489, §2; CCEO, can. 259, §2).

### 2.3.3 — *Commentary*

The retention of documents and the contents of the secret diocesan archives are matters addressed in canon law, notably canon 489 concerning the secret archives of the diocese. This canon replaced canon 379 of the 1917 Code.<sup>38</sup> In 1941 the Code Commission was asked to clarify canon 379 § 1 as to whether a brief summary of the facts needed to be retained when the accused died. “Whether the words of canon 379 § 1 *retento facti brevi sum-mario cum textu sententiae definitivae* (retaining only a brief summary of the facts, with the text of the definitive sentence), are to be applied only to cases which have been closed by a condemnatory sentence for ten years, or also to cases in which the accused have departed this life. Reply. In the affirmative to the first part, in the negative to the second.”<sup>39</sup> The Reply of the Code Commission clarified that a brief summary of the facts of a case was not kept when the accused died.

The secret archive and the retention of documents are both addressed in canon 489 of the 1983 Code.

Canon 489 § 1. In the diocesan curia there is also to be a secret archive, or at least in the ordinary archive there is to be a safe or cabinet, which is securely closed and bolted and which cannot be removed. In this archive documents which are to be kept under secrecy are to be most carefully guarded.

§2. Each year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since a condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement.

The text of canon 489 is less detailed than canon 379 of the 1917 Code. Each diocese is obliged to have an archive (or safe) for confidential documents. In this archive are documents concerning secretly celebrated

<sup>38</sup> *CIC/17*, c. 379 § 1. Bishops shall also have another secret archive or at least a safe or box, entirely closed and covered, in the common archive, from which place it cannot be moved. In it secret writings are to be most cautiously preserved; but promptly once a year, documents in criminal cases are to be burned in morals cases, [or] in which the defendant has died or ten years have passed from the condemnatory sentence, retaining only a brief summary of the facts, with the text of the definitive sentence.

<sup>39</sup> PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE CODE OF CANON LAW, reply, 5 August 1941, in *AAS*, 33 (1941), 378; *CLD*, vol. 2, 132.

marriages (c. 1133), criminal prosecutions, dispensations from occult marriage impediments, and penal remedies. Francesco Coccopalmerio thinks the archive should also hold other sensitive documents, such as the names of candidates for bishop and testimonials about a priest seeking to be incarcerated.<sup>40</sup>

The Holy See's response is significant because it points out that the destruction of documents is not to happen until either the accused has died, or ten years have elapsed since the sentence judging the accused. In those circumstances, "a short summary of the facts and the text of the definitive judgment are to be kept."<sup>41</sup> Gordon Read thinks that the retention of a summary of the facts only applies where there has been a definitive sentence, not when the accused has died.<sup>42</sup> However, Barbara Cusack argues for the retention of a summary of the facts when the accused has died, because of its value for historical purposes and the delay in reporting accusations of sexual abuse.<sup>43</sup>

There is a concern that documents in the secret archive might be destroyed during the time the see is vacant, but this is addressed in canon 490.

Canon 490 § 1. Only the Bishop is to have the key of the secret archive.

§ 2. When the see is vacant, the secret archive or safe is not to be opened except in a case of real necessity, and then by the diocesan Administrator personally.

§ 3. Documents are not to be removed from the secret archive or safe.

During the process of drafting this canon, custody of the key was provided to the diocesan bishop, the chancellor, and a priest designated by the bishop.<sup>44</sup> The final text only allowed the bishop to have the key,<sup>45</sup> because he is the only person with the right to access the documents in the secret archive. When the see is vacant, the diocesan administrator can access the secret archives only in case of necessity. To ensure the safe retention of documents, canon 491 provides for two copies of inventories or catalogues.<sup>46</sup>

<sup>40</sup> F. COCCOPALMERIO, in *Exegetical Comm*, vol. 2/1, 1160.

<sup>41</sup> *Ibid*.

<sup>42</sup> G. READ, in *CLSGBI Comm*, 272.

<sup>43</sup> B. CUSACK, in *CLSA Comm*2, 643.

<sup>44</sup> *Comm*, 24 (1992), 52, 61, 64, 86, 119, 128.

<sup>45</sup> *Comm*, 13 (1981), 124.

<sup>46</sup> Canon 491 § 1. The diocesan bishop is to ensure that the acts and documents of the archives of cathedral, collegiate, parochial and other churches in his territory are carefully kept and that two copies are made of inventories or catalogues. One of these copies is to remain in its own archive, the other is to be kept in the diocesan archive.

## 2.4 — Optional Celibacy

The Royal Commission observed that many clergy and religious did not observe celibacy, while others were poorly formed and lived unhappy lives. The Final Report states: “While not a direct cause of child sexual abuse, we are satisfied that compulsory celibacy (for clergy) and vowed chastity (for members of religious institutes) have contributed to the occurrence of child sexual abuse, especially when combined with other risk factors. We acknowledge that only a minority of Catholic clergy and religious have sexually abused children. However, based on research we conclude that there is an elevated risk of child sexual abuse where compulsorily celibate male clergy or religious have privileged access to children in certain types of Catholic institutions, including schools, residential institutions and parishes.”<sup>47</sup> This led to a recommendation about optional celibacy.

### 2.4.1 — Royal Commission Recommendation 16.18

*The Australian Catholic Bishops Conference should request the Holy See to consider introducing voluntary celibacy for diocesan clergy.*

### 2.4.2 — Response of the Holy See

While the Holy See accepts the good will of the Royal Commission in making the present recommendation, it wishes to emphasize the great value of celibacy and to caution against its reduction to a merely practical consideration. Indeed, it must be recalled that the practice of clerical celibacy is of very ancient origin, that it developed in imitation of the style of life chosen by Jesus Christ himself and that it cannot be understood outside the logic of faith and of the choice of a life dedicated to God. It is a question that touches also upon the right to religious freedom, that is to say, the freedom of the Church to organise her internal life in a manner coherent with the principles of the faith and the freedom of individuals to choose this form of life. With regard to any assertion of a link between celibacy and sexual abuse, a great deal of evidence demonstrates that no direct cause and effect exists. Sadly, the spectre of abuse appears across all sectors and types of society, and is found too in cultures where celibacy is hardly known or practiced, as Pope Francis observed at the conclusion of the meeting on the protection of minors in the Church held in the Vatican from February 21-24, 2019. And, as the Holy Father recalled on that occasion: “Here again I would state clearly: if in the Church there should emerge even a single

<sup>47</sup> RCIRCSA, *Final Report*, 46.

case of abuse—which already in itself represents an atrocity—that case will be faced with the utmost seriousness.”

### 2.4.3 — *Commentary*

In 2007, the *New York Times* reported a comparison between celibate clergy and non-celibate clergy relative to alleged sexual abuse of minors. In the United States, two hundred claims were made to American insurance companies by Protestant churches.<sup>48</sup> These claims were more than the total allegations against Catholic Church clergy in the same period. In Southern Baptist Churches, four hundred Church leaders abused nearly seven hundred victims, and many of these leaders continued in their roles.<sup>49</sup> Rik Torfs has also noted that compulsory celibacy is often viewed as a main cause of sexual crimes by clerics. However, he holds that clericalism and inadequate Church governance are also significant contributors.<sup>50</sup> A study by Douglas Pryor in the United States found that seventy percent of perpetrators of sexual abuse were married.<sup>51</sup>

Celibacy is a disciplinary law and is not essential to the priesthood. In 1971, Paul VI considered lifting compulsory celibacy, as reported by Bernhard Cardinal Alfrink Edward Schillebeeckx.<sup>52</sup> He refrained from doing so because he did not want to be the pope ending a long tradition. However, Pope Francis has suggested that, maybe one day, the Church could ordain *virī probati*, including married men, to the priesthood.<sup>53</sup>

Rather than celibacy being the problem, perhaps a more pressing matter has been the quality of seminarians and their preparation. As the number of applicants for seminaries declined in the 1970s and 1980s, it was tempting to lower admission standards. The governance review of the Catholic Church in Aus-

<sup>48</sup> THE ASSOCIATED PRESS, “Data Shed Light on Child Sexual Abuse by Protestant Clergy,” in *The New York Times*, 16 June 2007, <https://www.nytimes.com/2007/06/16/us/16protestant.html>.

<sup>49</sup> I. LOVETT, “Southern Baptists Approve Steps to Address Sexual Abuse,” in *The Wall Street Journal*, 11 June 2019, <https://www.wsj.com/articles/southern-baptists-approve-steps-to-address-sexual-abuse-11560303422>.

<sup>50</sup> TORFS, “Canon Law and the Recommendations of the Royal Commission,” 90.

<sup>51</sup> D. PRYOR, *Unspeakable Acts: Why Men Sexually Abuse Children*, New York, University Press, 1996, 297.

<sup>52</sup> E. SCHILLEBEECKX, *Theologisch testament: Notarieel nog niet verleden*, Nelissen, Baarn, 1994, 200.

<sup>53</sup> FRANCIS, interview with the German weekly, *Die Zeit*, 8 March 2017; “Pope Francis Signals Openness to Ordaining Married Men in Some Cases,” in *The New York Times*, 12 March 2017, <https://www.nytimes.com/2017/03/10/world/europe/pope-francis-married-priests.html>.

tralia recommends a national protocol on seminarian selection, training, and ongoing formation; that each diocesan bishop (or dioceses in combination if appropriate) establish a panel involving women and lay men for the selection process for entry of candidates into the seminary and discernment prior to ordination; that lay people take a critical role in the formation of seminarians and evaluations of suitability for ordination; and that there be a requirement for each diocesan bishop to consult the panel before accepting a foreign priest.<sup>54</sup>

Another issue is the acceptance by bishops of foreign seminarians and priests. In 1980, the Congregation for the Clergy issued Directive Norms on the distribution of clergy.<sup>55</sup> These norms point out that a better distribution of clergy is necessary to implement the mandate of Jesus Christ at his Ascension to preach the Gospel to everyone. The norms emphasise the importance of agreements between diocesan bishops concerning clergy working outside their own diocese. The norms require bishops, when accepting foreign clergy, to have an agreement with the Ordinary of the cleric. In practice, however, this requirement was often neglected, so it can be difficult to determine whether some bishops even made minimal consultations on the background and character of the clerics they were welcoming.

### 3 — *Other Recommendations*

The third part of the study takes up the remaining recommendations. The Holy See's first two responses (sections 3.1 and 3.2) may suggest a misunderstanding of canon law on the part of the Royal Commission, and the third a possible misunderstanding of a recommendation on the part of the Holy See (3.3). The final recommendation (3.4) is unique, in that it is not a specific change in canon law that is requested but consultation and information on the applicability of the seal of confession.

#### 3.1 — The "Pastoral Approach" Pre-empting a Canonical Trial

Many bishops and religious superiors failed to implement canon law or ignored canonical procedures but claimed to be dealing with offenders

<sup>54</sup> IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*.

<sup>55</sup> SACRED CONGREGATION FOR THE CLERGY, Directive Norms for Cooperation among Local Churches and for a Better Distribution of the Clergy *Postquam apostoli*, 25 March 1980, in AAS, 72 (1980), 343; CLD, vol. 9, 760-787.

pastorally. This has been one of the biggest contributors to the sexual abuse crisis facing the Church, and it has led to the next recommendation.

### 3.1.1 — *Royal Commission Recommendation 16.11*

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to ensure that the ‘pastoral approach’ is not an essential precondition to the commencement of canonical action relating to child sexual abuse.*

### 3.1.2 — *Response of the Holy See*

The Holy See takes careful note of the concerns expressed by the Royal Commission regarding recourse, in certain cases in the past, to what was sometimes erroneously termed a “pastoral approach.”

In this regard, it must be stressed that both the Code of Canon Law and the particular norms of the Congregation for the Doctrine of the Faith explicitly require that the Ordinary undertakes a preliminary investigation when informed of a suspected delict. To reinforce this principle, the recent *Motu proprio, Vos Estis Lux Mundi*, sets forth sanctions for ecclesiastical superiors who, either by “actions or omissions, interfere with or avoid civil or canonical investigations, whether administrative or penal” in connection with these grave delicts.

With regard to the initiation of an investigation or a penal process, some have claimed, inaccurately, that certain principles in the Code of Canon Law permit alternatives to the canonical process for the delicts of sexual abuse, citing, for example, the sections “Ways of avoiding trials” and “The application of penalties.”

This claim overlooks the clearly-stated principle that such alternatives “cannot validly be employed in matters which pertain to the public good” (CIC, can. 1715 §1). Since the serious crimes under consideration do indeed impact the public good, for they offend grievously against justice and greatly injure the community of the faithful, they must be the subject of a canonical penal process (judicial or administrative), precisely in order to restore justice, reform the offender and protect the faithful from further harm.

### 3.1.3 — *Commentary*

The response of the Holy See to this recommendation reiterates that diocesan bishops and religious ordinaries must implement penal law. In his Pastoral Letter to the Catholics of Ireland, Pope Benedict XVI states:

To my brother bishops: It cannot be denied that some of you and your predecessors failed, at times grievously, to apply the long-established norms of

canon law to the crime of child abuse. Serious mistakes were made in responding to allegations. I recognize how difficult it was to grasp the extent and complexity of the problem, to obtain reliable information and to make the right decisions in the light of conflicting expert advice. Nevertheless, it must be admitted that grave errors of judgement were made and failures of leadership occurred. All this has seriously undermined your credibility and effectiveness.<sup>56</sup>

The response of the Holy See is a reminder that canon 1715 § 1 excludes from settlement, and from compromise through arbitration, those matters that pertain to the public good of the Church and also everything that is outside the free disposition of the parties.<sup>57</sup> Penal cases (c. 1728) are of a public nature, like marriage cases (cc. 1691, 1696), so they cannot be the object of settlement or compromise. According to canon 1728 § 1: “Without prejudice to the canons of this title, and unless the nature of the case requires otherwise, in a penal trial the judge is to observe the canons concerning judicial procedures in general, those concerning the ordinary contentious process, and the special norms about cases which concern the public good.” A penal process is the best way to achieve justice and to observe the requirements of the law.<sup>58</sup> Canonical procedures are the best instruments to ensure justice for the victim and to safeguard the rights of the accused and the community of the faithful.<sup>59</sup> The diocesan bishop is bound to observe these procedures, nor does he have the power to dispense from procedural laws or penal laws (c. 87 § 1).<sup>60</sup> When a bishop receives information concerning an offence that seems to be true, he must begin a preliminary investigation (c. 1717 § 1) and then discern whether to begin a penal process (c. 1718 § 1).

<sup>56</sup> BENEDICT XVI, Pastoral Letter to the Catholics of Ireland, 19 March 2010, [http://www.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf\\_ben-xvi\\_let\\_20100319\\_church-ireland.html](http://www.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html).

<sup>57</sup> See RODRIGUES-OCANA, in *Exegetical Comm*, vol. 6/2, 1977.

<sup>58</sup> R. BACCARI, *Elementi di diritto canonico*, Bari, 1984, 103, cited in R. COPPOLA, *Exegetical Comm*, vol. 1, 2034.

<sup>59</sup> COPPOLA, *Exegetical Comm*, vol. 1, 2034.

<sup>60</sup> This principle was expounded in *Christus Dominus* 8b, and procedural and penal laws were excluded from the power of bishops to dispense in the *motu proprio De Episcoporum muneribus*. See PAUL VI, Apostolic Letter m.p. *De Episcoporum muneribus*, 15 June 1966, in AAS, 58 (1966), 467; CLD, vol. 6, 396-397. “IV. According to the norm of can. 80, by dispensation is meant the *dissolution of the law for a special case*. The faculty to dispense can be exercised with respect to the *precipitating or prohibiting laws*, but not to the *constitutive ones*. The notion of dispensation does not include the granting of license, faculty, pardon and acquittal. The procedural laws, since they are established in defense of rights, also taking into account that their dispensation does not concern the spiritual good of the faithful, are not the subject of the faculty referred to in the Decree *Christus Dominus*, n. 8 b.” Cf. J. LOBELL, “Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale,” in *IE*, 3 (1991), 431-477.

### 3.2 — Diagnosis of a Psychological Disorder and Imputability

Some perpetrators of sexual abuse were not dismissed from the clerical state or a religious institute because they were diagnosed with paedophilia. This fact gave rise to the next recommendation.

#### 3.2.1 — *Royal Commission Recommendation 16.13*

*The Australian Catholic Bishops Conference should request the Holy See to amend the ‘imputability’ test in canon law so that a diagnosis of paedophilia is not relevant to the prosecution of or penalty for a canonical offence relating to child sexual abuse.*

#### 3.2.2 — *Response of the Holy See*

In relation to the question of imputability and its relevance as a factor in canonical processes, it should be stressed that both the Code of Canon Law and the Code of Canons of the Eastern Churches (CCEO) articulate the fundamental principle that imputability is presumed in any external infraction of the law (CIC c. 1321, §3; CCEO c. 1414). The canonical prosecution of an offense is not precluded by a medical or psychological diagnosis. As in many other criminal law systems, however, Canon Law permits claims regarding diminished imputability to be properly examined in the course of the proceedings (CIC cc. 1322-1324).

#### 3.2.3 — *Commentary*

Imputability means “the state or condition rendering one chargeable for an act.”<sup>61</sup> It is different from guilt. The presumption of imputability for an external action is addressed in canon 1321.

Canon 1321 § 1. No one can be punished for the commission of an external violation of a law or precept unless it is gravely imputable by reason of malice or of culpability.

§ 2. A person who deliberately violated a law or precept is bound by the penalty prescribed in the law or precept. If, however, the violation was due to the omission of due diligence, the person is not punished unless the law or precept provides otherwise.

§ 3. When there has been an external violation, imputability is presumed, unless it appears otherwise.

<sup>61</sup> H. BLACK (ed.), *Black’s Law Dictionary*, Minneapolis/St. Paul, 1983, 386.



The President of the Pontifical Council for Legislative Texts, Cardinal Francesco Coccopalmerio, states in the introduction to the draft schema of a revised Book VI of the Code, sent out to Bishops' Conferences for consultation in July 2011, that experience had demonstrated that the provisions of penal law needed strengthening because many bishops had seen implementing penal law as contrary to charity.<sup>62</sup> However, the revised canon 1343 states that the judge "is to determine the matter according to his own conscience and prudence and in accordance with what the restoration of justice, the reform of the offender and the repair of scandal require."<sup>63</sup> In promulgating the revised penal law on 23 May 2021, Pope Francis stated: "Charity thus demands that the Church's pastors resort to the penal system whenever it is required, keeping in mind the three aims that make it necessary in the ecclesial community: the restoration of the demands of justice, the correction of the guilty party and the repair of scandals."<sup>64</sup>

### 3.3 — National Tribunal for Criminal Cases

The Royal Commission notes the lack of expertise in many dioceses and comments on the divisions between bishops and canonists over the seal of confession and other canonical issues. These divisions highlight a lack of competent personnel, leading to the following recommendation about combining expertise.

#### 3.2.1 — *Royal Commission Recommendation 16.15*

*The Australian Catholic Bishops Conference and Catholic Religious Australia, in consultation with the Holy See, should consider establishing an Australian tribunal for trying canonical disciplinary cases against clergy, whose decisions could be appealed to the Apostolic Signatura in the usual way.*

#### 3.2.2 — *Response of the Holy See*

The proposal to create local penal tribunals is under examination. In the current practice of the Congregation for the Doctrine of the Faith, which has exclusive competence for all cases involving clerics, local tribunals already play a significant role, since they are frequently asked to instruct individual cases. However, a number of questions around the present proposal need to

<sup>62</sup> PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Schema recognitionis Libri VI Codici Iuris Canonici*, Typis Vaticanis, 2011; unofficial translation by G. READ.

<sup>63</sup> FRANCIS, *CIC*, 2021.

<sup>64</sup> *Ibid.*

be carefully considered. For example, given the extension of the Church throughout the world and the very different conditions that exist from country to country, the availability of resources for the establishment of penal tribunals and the presence of adequately prepared personnel to staff such tribunals would have to be assessed.

### **3.2.3 — Commentary**

The Holy See seems to have misunderstood the recommendation. At present, the regional tribunals in Australia are competent for all canonical cases, including penal cases. Local tribunals usually only deal with declarations of marriage nullity. The Royal Commission believes that the pooling of expertise in a national tribunal would be more effective in handling penal cases in which the penalty could be dismissal from the clerical state. The Bishops' Conference of France has recognised the wisdom of having a national tribunal for penal cases in France.<sup>65</sup>

## **3.4 — The Seal of Confession**

On the question of the seal of confession, the Royal Commission made the following recommendation.

### **3.4.1 — Royal Commission Recommendation 16.26**

*The Australian Catholic Bishops Conference should consult with the Holy See, and make public any advice received, in order to clarify whether:*  
*(a) information received from a child during the sacrament of reconciliation that they have been sexually abused is covered by the seal of confession;*  
*(b) if a person confesses during the sacrament of reconciliation to perpetrating child sexual abuse, absolution can and should be withheld until they report themselves to civil authorities.*

### **3.4.2 — Response of the Holy See**

With its Note on the importance of the internal forum and the inviolability of the sacramental seal, published on 29 June 2019, the Apostolic Penitentiary has furnished useful indications for arriving at a considered response to the questions raised in the present recommendation. It will be

<sup>65</sup> C. HENNING, "French Bishops to Create a National Canonical Criminal Court," in *National Catholic Reporter*, 16 April 2021, <https://www.ncronline.org/news/accountability/french-bishops-create-national-canonical-criminal-court>.

recognised at once that the question of the confessional seal is one of great delicacy and that it is related intimately with a most sacred treasure of the Church's life, that is to say, with the sacraments.

The aforementioned Note repeats the constant tradition of the Church with regard to the seal of confession, recalling that: "The confessor is never allowed, for any reason whatsoever, 'to betray in any way a penitent in words or in any manner' (can. 983, §1), just as 'a confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded' (can. 984, §1)." The Note helpfully clarifies the extent of the seal, which includes: "all the sins of both the penitent and others known from the penitent's confession, both mortal and venial, both occult and public, as manifested with regard to absolution and therefore known to the confessor by virtue of sacramental knowledge." The Note gives expression to the long-standing and constant teaching of the Church on the inviolability of the sacramental seal, as something demanded by the nature of the sacrament itself and thus as deriving from Divine Law. See for example: Fourth Lateran Ecumenical Council (1215), Cost. 21; Pope Clement VIII, Decr. *Ad omnes superiores regulares* (1593); Decr. *S. Officii* (1682); Pope Benedict XIV, *Breve Suprema omnium ecclesiarum* (1745).

However, even if the priest is bound to scrupulously uphold the seal of the confessional, he certainly may, and indeed in certain cases should, encourage a victim to seek help outside the confessional or, when appropriate, to report an instance of abuse to the authorities.

Concerning absolution, the confessor must determine that the faithful who confess their sins are truly sorry for them and that they have a purpose of amendment (cfr. CIC, can. 959). Since repentance is, in fact, at the heart of this sacrament, absolution can be withheld only if the confessor concludes that the penitent lacks the necessary contrition (cfr. CIC, can. 980). Absolution then, cannot be made conditional on future actions in the external forum.

It should be recalled also that the confessional provides an opportunity—perhaps the only one—for those who have committed sexual abuse to admit to the fact. In that moment the possibility is created for the confessor to counsel and indeed to admonish the penitent, urging him to contrition, amendment of life and the restoration of justice. Were it to become the practice, however, for confessors to denounce those who confessed to child sexual abuse, no such penitent would ever approach the sacrament and a precious opportunity for repentance and reform would be lost.

Finally, it is of paramount importance that formation programmes for confessors include a detailed analysis of Church law, including the "Note" of the Apostolic Penitentiary, together with practical examples to instruct priests concerning difficult questions and situations that may arise. These may include, for example, principles for the kind of dialogue a confessor should have with a young person who has been abused or appears vulnerable to abuse, as well as with anyone who confesses to having abused a minor.

### 3.4.3 — *Commentary*

Experience demonstrates that offenders often repeat their sexual abuse. Michael McArdle, a convicted paedophile, said he received absolution fifteen hundred times for sins of sexual abuse in his thirty years as a priest.<sup>66</sup> Many believe he was exaggerating. Archbishop Mark Coleridge, in his submission to the Queensland Parliament's Legal Affairs and Community Safety Committee on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019, said: "Perhaps former priests who have been found guilty of child abuse should not be so readily believed by media when they claim to have confessed their abuse when much of their life has been a lie."<sup>67</sup> Nevertheless, if McArdle had received absolution numerous times for the sin of sexual abuse of a minor, his behaviour is despicable, and his confessors may have been gravely negligent. In France, there have been similar cases.<sup>68</sup> The Apostolic Penitentiary needs to provide more detailed advice on dealing with sexual abusers, both clerical and lay, in the confessional. Bishops and priests need to be clear how to deal with abusers who are penitents to ensure that they have a true purpose of amendment and get effective help to stop their abuse.

Priests can delay or even deny absolution to a person confessing sexual abuse of minors. Pope Blessed Innocent XI condemned the proposition that a priest could grant absolution to a penitent when there appeared no hope of amendment.<sup>69</sup> Penitents, who are judged by the confessor to have no real intention of reforming and avoiding the occasions of sin, can have absolution deferred or refused until the confessor judges their intention of amendment to be sincere (cc. 978 § 1, 980). However, a confessor can never require a

<sup>66</sup> K. AGIUS, *Australian Broadcasting Company News*, 17 January 2020, <https://www.abc.net.au/news/2020-01-18/catholic-church-mandatory-reporting-child-abuse/11876130>.

<sup>67</sup> M. COLERIDGE, "Submission to the Queensland Parliament's Legal Affairs and Community Safety Committee on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019," 3 January 2020, <https://www.parliament.qld.gov.au/documents/committees/LACSC/2019/CriminalCodeChild2019/submissions/010.pdf>.

<sup>68</sup> "Aside from church superiors, Preynat said he also systematically spoke about his behaviour in the confessional. 'I always confessed my faults,' he said. 'Every time the confessor gave me absolution and urged me not to start again. A month later, I'd start again'." N. VAUX-MONTAGNY, "Church Covered for Predator Priest," *Crux*, 20 January 2020, <https://cruxnow.com/church-in-europe/2020/01/french-trial-exposes-how-church-covered-for-predator-priest/>.

<sup>69</sup> HOLY OFFICE, Decree, 2 March 1679 (Denzinger, no. 2164), quoted in I. WATERS, "The Seal of Confession," *The Australasian Catholic Record*, 340. Proposition number 60 stated: "The penitent who has the habit of sinning against the law of God, of nature, or of the Church, even if there appears no hope of amendment, is not to be denied absolution or to be put off, provided he professes orally that he is sorry and proposes amendment."

penitent to hand himself over to civil authorities, as the Apostolic Penitentiary points out. In the presence of sins that involve criminal offenses, it is never permissible, as a condition for absolution, to place on the penitent the obligation to turn himself in to civil justice, by virtue of the natural principle, incorporated in every system, according to which *nemo tenetur se detegere*.<sup>70</sup> The confessor can encourage a penitent to hand himself in to civil authorities, but he cannot make the granting of absolution conditional on this.<sup>71</sup> A priest is not bound by the seal of confession, however, concerning matters he learns outside the context of sacramental confession.

Not everyone understands that the Catholic faithful are free to go to confession anonymously, confessing behind a screen or grill. The priest usually has no idea who is confessing, and he is not permitted to ask the identity of any person with whom the penitent may have sinned (c. 979). The essential element of a sacramental confession is the penitent's contrition and intention of receiving absolution. If the penitent is a paedophile confessing his personal sin of sexual abuse of a minor, the seal of confession applies to the priest/confessor. Upholding the seal of confession is a serious obligation for priests. The seal is not just to protect the privacy of the penitent. It is founded on the necessity to protect the dignity of the sacrament. Montini explains that the sacramental seal cannot be removed from the confessor at the discretion of the penitent, as he is not the guardian of the seal and may be subject to various pressures.<sup>72</sup>

Priests can and must help child victims as much as they can while upholding the seal of confession. If someone later states what had earlier been stated in confession, obviously the knowledge is now in the external forum—but care must be taken not to confuse what is under the seal and what is not. In any event, what is said in confession remains always sealed. Because of the complexity of such situations, bishops, major superiors of clerical religious institutes, and members of sexual abuse protocol committees should not hear the confessions of priests, to avoid any potential conflict of interest.

<sup>70</sup> APOSTOLIC PENITENTIARY, Note of the Apostolic Penitentiary on the importance of the internal forum and the inviolability of the sacramental seal, 1 July 2019. In the presence of sins that indicate offenses, it is never permissible to place the penitent, as a condition for absolution, the obligation to establish himself for civil justice, by virtue of the natural principle, incorporated in every order, according to which “*nemo tenetur se detegere*”. <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2019/07/01/0565/01171.html>.

<sup>71</sup> Ibid. A parallel example is a confessor cannot require an unfaithful husband to tell his wife of the affair.

<sup>72</sup> G.P. MONTINI, *La tutela penale*, 226-227.

## *Conclusion*

The Royal Commission blamed clericalism as a key cause of failures to deal with the sexual abuse of minors within the Catholic Church. This is part of the systemic failure that led to neglecting the input of laity.<sup>73</sup> The authority of bishops and how it has been exercised was a constant issue for the Royal Commission. Torfs notes that the diocesan bishop has very wide powers in his diocese with few limitations and checks;<sup>74</sup> he believes some structural changes in canon law are necessary. A true separation of powers and more allowance for laity in Church governance are needed.<sup>75</sup> Pope Francis has promoted synodality, meaning the active participation of all members of the Church in its processes of discernment, consultation, and cooperation at every level. Pope Francis believes that this renewal of the Church cannot be deferred: “the path of synodality is the path that God expects from the Church of the third millennium.”<sup>76</sup> Synodality will result in better decisions in all areas of the Church’s life.<sup>77</sup>

The response of the Holy See to the Recommendations of the Royal Commission reminds the Australian Church and all Church leaders that there needs to be a proper appreciation of the value of canon law in ecclesial practice. The sexual abuse crisis was exacerbated by an arbitrary, antinomian approach to canonical procedures and penalties. If canon law had been implemented, the commission of many crimes could have been prevented and both victims and the Church at large could have been spared considerable pain.

<sup>73</sup> Luis Navarro recognises the fundamental character of the principle of equality. “The principle of radical equality constitutes a true constitutional principle which, as such, must inform canon law in its entirety.” Cf. NAVARRO, “Il principio costituzionale di uguaglianza nell’ordinamento canonico,” 158.

<sup>74</sup> Canon 381 § 1. In the diocese entrusted to his care, the diocesan Bishop has all the ordinary, proper and immediate power required for the exercise of his pastoral office, except in those matters which the law or a decree of the Supreme Pontiff reserves to the supreme Pontiff or to some other ecclesiastical authority.

<sup>75</sup> TORFS, “Canon Law and the Recommendations of the Royal Commission,” 92.

<sup>76</sup> FRANCIS, speech at the commemoration of the 50<sup>th</sup> anniversary of the institution of the Synod of Bishops, <http://www.synod.va/content/synod/en/news/synodality-in-the-life-and-mission-of-the-church-by-the-interna.html>.

<sup>77</sup> *The Light of the Southern Cross* acknowledges that the current canon law “allows laypersons to cooperate in the exercise of jurisdiction, but should also be interpreted and implemented in light of legal provisions that have occurred since the promulgation of the 1983 Code.” IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*.

## VULNERABILITY OF WOMEN RELIGIOUS IN THE CONTEXT OF ABUSE

KARLIJN DEMASURE

**SUMMARY** — This essay explains the dynamics behind the problem in certain areas of the sexual abuse of women religious by clergy. While such abuse has some similarities to the sexual abuse of minors, it also has some unique aspects. Solutions to the problem include acknowledging that it exists, augmenting the intellectual formation of women religious, confronting the culture of clericalism, and supporting religious who report abuse and pursuing their complaints.

**RÉSUMÉ** — Cet essai explique la dynamique qui sous-tend le problème, dans certaines régions, de l'abus sexuel de femmes religieuses par le clergé. Si ces abus présentent des similitudes avec les abus sexuels sur mineurs, ils présentent également des aspects uniques. Les solutions au problème comprennent la reconnaissance de son existence, l'augmentation de la formation intellectuelle des femmes religieuses, la confrontation avec la culture du cléricalisme, le soutien aux religieuses qui signalent les abus et la poursuite de leurs plaintes.

### *Introduction*

In addressing the recent sexual abuse crisis, the Catholic Church initially focused on the sexual abuse of minors. However, awareness has grown in both secular society and the Church that adults also can be abused. The #MeToo movement against sexually transgressive behavior began in 2017 and targeted individuals in politics, media, or show business who took advantage of their positions to abuse people, particularly women. Many women responded via social media to address their own experiences of abuse. In this article, we will explore the vulnerability of a particular group of women, namely women religious. This study will be undertaken in light of Pope Francis' understanding of the term "vulnerable persons" as possible victims of sexual abuse in the *motu proprio* *Vos estis lux mundi* (VE).

On 7 May 2019, Pope Francis published the *motu proprio* *Vos estis*.<sup>1</sup> This document brought about several changes in the awareness and handling of sexual abuse complaints. One important change was the recognition that, in addition to minors, vulnerable persons may also be subject to canonical crimes against the sixth commandment of the Decalogue. The document, which is *ad experimentum* for three years, defines a vulnerable person as “any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want to otherwise resist the offense” (*VE*, art. 1 §1a). In this article, we will examine the sexual abuse of religious sisters by members of the clergy or male religious to explore whether the sisters fall under into the category of “vulnerable persons.” To do this, we will look at how and when awareness was raised, discuss the causes and factors that may facilitate abuse, and describe the dynamics involved in this abuse relative to the abuse of minors. Further, we will make some suggestions for moving forward. Finally, we will bring the elements together that allow us to provide a nuanced perspective on the vulnerability of women religious.

## 1 — *Vulnerable Persons*

To determine whether women religious fall under the definition of vulnerable persons, we first need to explore the definition of sexual abuse found in *VE*. Specifically, the delict is defined as “forcing someone, by violence or threat or through abuse of authority, to perform or submit to sexual acts” (*VE* art. 1 § 1a). There are several key elements of the definition.

- To **force** someone is to compel that person by physical, moral, or intellectual means.<sup>2</sup>
- The concept of **violence** has various understandings, so we will rely on the one used by the World Health Organisation. “The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.”<sup>3</sup>

<sup>1</sup> FRANCIS, Apostolic Letter m.p. *Vos estis lux mundi*, 7 May 2019, at [www.vatican.va](http://www.vatican.va).

<sup>2</sup> <https://www.merriam-webster.com/dictionary/force>, consulted, 12/05/2021.

<sup>3</sup> World report on violence and health: summary. Geneva, World Health Organization, 2002, 4.



- A **threat** can be defined as “an expression of intention to inflict evil, injury, or damage.”<sup>4</sup> Threat itself can be considered abuse because the anxiety it provokes reflects negatively on the mental health of a person. In addition, the person is forced to comply with the perpetrator because he/she wants to avoid the consequences uttered in the threat.
- “**Abuse of authority** means an individual’s improper use of power inherent in the position held, by means of intimidation, threats, blackmail or coercion.”<sup>5</sup> Authorised power is used for improper purposes, such as sexual gratification or domination.

Considering the case of women religious, the categories of infirmity and physical or mental deficiency usually do not apply. What needs to be ascertained is whether there is deprivation of liberty that prevents the woman from understanding and consenting to or else resisting the offense. The liberty to give a valid consent can be prevented by violence (force) or abuse of authority, including but not limited to threats, intimidation, or coercion. Thus, we can reframe the original question as follows: Are women religious prevented from giving valid consent to a sexual relationship because of the use of force or abuse of authority? If the answer is yes, then they fall into the category of “vulnerable persons,” even if this is only occasionally.

## 2 — Awareness of the Problem

Sr. Maura O’Donohue was a member of the Missionary Sisters of Medicine and is believed to have been the first to alert the Holy See about the problem of sexual abuse of women religious by Catholic priests and religious. Two documents are available on the internet. The first, dated February 1994, is entitled *Memo from Sr. Maura O’Donohue MMM; Urgent Concerns for the Church in the Context of HIV/Aids*.<sup>6</sup> The second document is dated February 1995 and is entitled *Personal Memo of Sr. Maura O’Donohue MMM, Meeting at SCR, Rome, 18 February 1995*.<sup>7</sup> The meeting referred to occurred with Cardinal Eduardo Martinez, the Prefect of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL), during which the problem of the abuse was discussed.

<sup>4</sup> <https://www.merriam-webster.com/dictionary/threat>, consulted 30/06/2021.

<sup>5</sup> <https://www.lawinsider.com/dictionary/abuse-of-authority>, consulted 30/06/2021.

<sup>6</sup> [https://natcath.org/NCR\\_Online/documents/UrgentConcernsO'DONOHUE.htm](https://natcath.org/NCR_Online/documents/UrgentConcernsO'DONOHUE.htm), consulted 12/02/2019.

<sup>7</sup> [https://natcath.org/NCR\\_Online/documents/PersonalMemoO'DONOHUE.htm](https://natcath.org/NCR_Online/documents/PersonalMemoO'DONOHUE.htm), consulted 12/02/2019.

These documents are based on Sister Maura O'Donohue's visits to Africa, Asia, the Americas, and Europe, as part of her role as AIDS Coordinator for the Catholic Funds for Overseas Development. Most of these visits were made with Father Robert J. Vitillo, Director of Programmes at Caritas Internationalis. In these documents, the author gives a general overview of the facts relating to HIV, before indicating that the epidemic also affected priests and religious. She identified twenty-three countries<sup>8</sup> in which AIDS had infected priests and religious. She offered an example of one country which had fewer than 320 diocesan priests in 1991, yet three had died from AIDS, four were dying, and twelve were infected.<sup>9</sup> In 1998, Sr. Marie McDonald, a member of the Missionary Sisters of Our Lady of Africa, submitted a report to the International Union of Superiors General and CICLSAL. Entitled *The Problem of the Sexual Abuse of African Religious in Africa and in Rome*, the report pointed to the same problem as had Sr. Maura O'Donohue, but McDonald limited her observations to African religious.

On 23 March 1994, Fr. Robert Vitillo gave a presentation at Boston College entitled *Theological Challenges Posed by the Global Pandemic of HIV/Aids*. He expressed concern that the scandal of sexual abuse of minors had overshadowed the attention needed relative to the abuse of women religious. "Frequently, attempts to raise these issues with local and international Church authorities have met with deaf ears. In North America and in some parts of Europe, our Church is already reeling under the pedophilia scandals. How long will it take for this same institutional Church to become sensitive to these new abuses which are resulting from the pandemic?"<sup>10</sup> In 2000, Benedictine Sister Esther Fangman raised the same issue in an address at a Roman congress of 250 Benedictine abbots.

The Holy See did not respond to a March 2001 *National Catholic Reporter* online article on the subject,<sup>11</sup> but Joaquin Navarro-Valls, the Director of the Press Office of the Holy See, reacted after the Italian media rehashed the article. He stated that the problem is known but is limited to a geographically restricted area.<sup>12</sup> However, the twenty-three countries identified by Sister Maura O'Donohue argues against this assertion. In addition, the research of

<sup>8</sup> The countries are Botswana, Burundi, Brazil, Colombia, Ghana, India, Ireland, Italy, Kenya, Lesotho, Malawi, Nigeria, Papua New Guinea, Philippines, Sierra Leone, South Africa, Tanzania, Tonga, Uganda, United States, Zambia, Zaire, and Zimbabwe.

<sup>9</sup> [https://natcath.org/NCR\\_Online/documents/UrgentConcernsO'DONOHUE.htm](https://natcath.org/NCR_Online/documents/UrgentConcernsO'DONOHUE.htm), consulted, 29/06/2021.

<sup>10</sup> [https://natcath.org/NCR\\_Online/documents/VitilloHIVreport.htm](https://natcath.org/NCR_Online/documents/VitilloHIVreport.htm), consulted, 29/06/2021.

<sup>11</sup> [https://natcath.org/NCR\\_Online/archives2/2001a/031601/031601a.htm](https://natcath.org/NCR_Online/archives2/2001a/031601/031601a.htm), consulted 06/02/2021.

<sup>12</sup> <https://www.irishexaminer.com/world/arid-30007229.html>, consulted 23/07/2021

J.T. Chibnal, A. Wolf, and P.N. Duckro indicates that the problem is not limited to Africa or Asia. They received 1210 responses from women religious to their survey on sexual trauma, which they defined as child sexual abuse, sexual exploitation, coercion, work sexual harassment, and sexual violence such as rape.<sup>13</sup> Their research included child sexual abuse, because of the link to re-victimization in adulthood. The results indicate that the trauma of sexual abuse is very much present in women religious.

- Lifetime prevalence of sexual abuse: 39.9%
- Prevalence of during religious life: 29.9%
- All types of abuse included (also child sexual abuse, and work-related abuse)
- Abuse by lay persons: 46.7%
- Abuse by sisters: 29.9%
- Abuse by clergy: 21.2%
- Unknown: 2.2%

While the research of Chibnal et al. took place in the United States in 1998, the research of Missio Aachen from 2020 was conducted in Asia and Africa.<sup>14</sup> The survey was intended to be an initial exploration of the problem and does not present a sound study based on a representative survey. Taking these limitations into account, the study is nevertheless interesting. It asked about the extent of the problem, actions already taken, challenges, support for victims, and prevention. While it sought to collect information on various forms of abuse, the responses were limited to sexual abuse and indicate that the problem persists.

### 3 — *Some Causes and Enablers of Abuse*

As with the sexual abuse of minors, there is no single reason for the abuse of women religious. For example, Sister Maura O'Donohue<sup>15</sup> identified these women as “safe targets” for sexual activity because of their vow of chastity, whereas prostitutes would be high-risk partners because of their frequent

<sup>13</sup> J.T. CHIBNAL, A. WOLF, P.N. DUCKRO, “A National Survey of the Sexual Trauma Experiences of Catholic Nuns,” in *Review of Religious Research*, 40/2 (1998), 142-167. The authors summarize the above and all forms of sexual behavior involving violence, coercion, or mental or physical stress/injury (either immediate or over time) under the term “sexual trauma.”

<sup>14</sup> J. BECK-ENGELBERG (on behalf of MISSIO AACHEN), *Results of the Missio Survey on the Issue of Abuse of Women Religious*, Rheinbreitbach, 2020, 2. There were a total of 101 completed questionnaires: 3 from members of international organisations, 27 from respondents staying in 10 African countries, 70 from respondents in 8 countries in Asia, and 1 from a country in the Pacific.

<sup>15</sup> [https://natcath.org/NCR\\_Online/documents/UrgentConcernsO'DONOHUE.htm](https://natcath.org/NCR_Online/documents/UrgentConcernsO'DONOHUE.htm), consulted 28/06/2021.

sexual relations. Yet, the abuse did not stop after the HIV/AIDS epidemic was under control, as the *Missio Aachen*<sup>16</sup> and Mary Lembo studies revealed;<sup>17</sup> nor did it play a role in the results of the research of J.T. Chibnal, A. Wolf, and P.N. Duckro either.<sup>18</sup> There are, however, two clusters of factors that are particular to the sexual abuse of women religious by clergy. These are the vulnerability of women religious in institutes of diocesan right and their revictimization, and the reality of patriarchy and clericalism.

### 3.1 — Diocesan Institutes, Vulnerability and Revictimization

Women religious who belong to institutes of diocesan right are often vulnerable because they depend on the local bishop for their survival. In cases of abuse by diocesan priests, the sisters often are obliged to keep silent, and the victims are sent away, especially if pregnancy is the result. We can see a double dynamic at work here: blaming the victims and re-victimisation. The victim is treated as guilty, and the innocent is punished. The abuse is attributed to the sister, who is usually blamed for seducing the priest.

Other dynamics may also play a role, as Sister Geneviève Médevielle, a professor of moral theology at the Catholic Institute of Paris explains in a January 2019 interview in *Lacroix International*. “A young religious woman may also idealize the priest who is provided to her as a spiritual adviser. If she stumbles across a predator, he will make use of the spiritual relationship to turn her into his sexual prey. He will make her feel that she is not beautiful or intelligent and therefore unattractive. She will then feel that she is perhaps not the object of desire and thus that it is her responsibility.”<sup>19</sup>

The religious woman is often re-victimised, in that she is not heard or is unjustly punished while the priest often is merely transferred to another parish or sent off for studies.<sup>20</sup> The impunity of the priests responsible for the abuse is one of the main reasons the abuses do not stop, says Lucetta Scarafia, an Italian historian and journalist.<sup>21</sup> Sister Maura O’Donohue reports that in one

<sup>16</sup> J. BECK-ENGELBERG, *Results of the Missio Survey*.

<sup>17</sup> M. MAKAMATINE LEMBO, *Relations pastorales saines et mûres : maturité affective et sexuelle pour une collaboration entre prêtres et consacrées, témoignage pour le Règne de Dieu*, Thèse doctorale, Université Pontificale de la Grégorienne, Rome, 2019.

<sup>18</sup> J.T. CHIBNAL, A. WOLF, P.N. DUCKRO (1998), “A National Survey.”

<sup>19</sup> <https://international.la-croix.com/news/religion/sexual-abuse-often-begins-from-a-spiritual-relationship/9250>, consulted 28/06/2021.

<sup>20</sup> [https://natcath.org/NCR\\_Online/documents/McDonaldAFRICAreport.htm](https://natcath.org/NCR_Online/documents/McDonaldAFRICAreport.htm), consulted 25/04/2021.

<sup>21</sup> <https://international.la-croix.com/news/religion/losservatore-romano-praises-media-for-shedding-light-on-sexual-abuse/8246>, consulted 28/06/2021.

congregation twenty sisters were sent away because they were pregnant, in many cases at the hands of priests. Sometimes, sisters were forced to have abortions, leaving them with a lifetime of guilt.<sup>22</sup> If the women were sent away, they often had to raise the child alone, because scandal means they may not be able to count on the support of family. If the religious woman is also infected with HIV, either a short life or a life under heavy medical burdens awaits her. F. Yumba Wa Kumwenda has demonstrated that many in the Democratic Republic of Congo leave treatment.<sup>23</sup> If the mother dies of AIDS, the child often ends up on the street. Thus, the sexual abuse of women religious is not only a sexual transgression but is also a matter of social justice.

Finally, it is important to note that, in many cases, priests utilise their spiritual authority to gain sexual favors. Sister Geneviève Médevielle writes: “Sexual abuse of women religious by priests usually develops from a relationship that was originally spiritual. This happens because he is the confessor, the chaplain, or even the bishop.”<sup>24</sup>

### 3.2 — Patriarchy and Clericalism<sup>25</sup>

A 12 July 2021 webinar revealed the survey results on hierarchical exploitation of women religious in India.<sup>26</sup> These results have also been published in the book, *It's High Time. Women Religious Speak up on Gender Justice in the Indian World*.<sup>27</sup> It was commissioned by the women's section of the Conference of Religious of India and written by a three-member team led by Sister Hazel D'Lima, former superior general of the Society of the

<sup>22</sup> [https://natcath.org/NCR\\_Online/documents/UrgentConcernsO'DONOHUE.htm](https://natcath.org/NCR_Online/documents/UrgentConcernsO'DONOHUE.htm), consulted 28/06/2021.

<sup>23</sup> F. Yumba WA KUMWENDA, *Accompagnement spirituel de la personne vivant avec le VIH/SIDA en milieu hospitalier catholique de Kinshasa. Enjeux de l'articulation santé-souffrance-salut*, thèse doctorale, Université Catholique de Louvain et Université Catholique du Congo, 2015.

<sup>24</sup> Read more at <https://international.la-croix.com/news/religion/sexual-abuse-often-begins-from-a-spiritual-relationship/9250>, consulted 20/02/2019.

<sup>25</sup> <https://mattersindia.com/2021/06/no-church-possible-without-women-religious>, consulted 05/07/2021.

<sup>26</sup> <https://www.globalsistersreport.org/news/news/news/webinar-airs-survey-results-hierarchical-exploitation-india-nuns>, consulted 14/07/2021.

<sup>27</sup> <https://mattersindia.com/2021/07/survey-highlights-hierarchical-exploitation-of-nuns-in-india/>, consulted, 23/07/2021. “De Souza said they were told that bishops were not happy about the survey. Later, the executive commission of [the Conference of Religious India] seemed plagued by fears and withheld their consent to publish the study,” she explained. Towards the end we had to seek legal counsel to reassure ourselves that we could and should get it printed and, more important, disseminate the study to all the respondents and bishops in the country.” The book was delivered to me in a PDF version.

Daughters of the Heart of Mary.<sup>28</sup> The team contacted about five hundred women major superiors and persons of influence in different women's religious institutes in India. One hundred and twenty-one people replied.

The book does not treat the topic of sexual abuse, but it addresses property issues; low wages for work or no wages at all, ignoring the competencies and professionalism of the sisters; harassment in work situations; and negative criticism in person or from the pulpit in public. This is in line with the Union of International Superiors General statement of 23 November 2018, which requested reporting of all forms of abuse, given that abuse is linked to human dignity: "... sexual, verbal, emotional, or any inappropriate use of power within a relationship, diminishes the dignity and healthy development of the person who is victimized."<sup>29</sup>

The roots of all abuse of women religious are patriarchy and clericalism. Sr. Noella de Souza of the Missionaries of Christ Jesus puts it as follows: "The patriarchal and hierarchical system ... keeps women in a low second place. Many women's congregations often comply submissively to what the bishops desire, thinking it is the patriarchal and hierarchical Church that has to have the last right word in what has to be. Seminarians see sisters as menial labor and get used to ordering them around; parish priests see women religious there only to carry out their orders."<sup>30</sup>

Patriarchy is fundamentally linked to gender. Women are seen as inferior and at the service of men. In the context of the Church, this means that women in general—and women religious in particular—are at the service of priests, male religious, and seminarians. This view has been internalized and accepted by many women, which guarantees the continuation of this situation. Women religious often cannot imagine another social structure and do not confront the unjust system. Sister Noella De Souza calls this the "sin of passivity."<sup>31</sup> Sisters often learned to interpret "obedience" as submission to those higher in the hierarchy, even more so when they are older men or priests. Sr. Médievielle writes: "A young religious woman is in a vulnerable situation. In her enthusiasm to give herself completely to Christ and in her concern for perfection, she may tend to idealize obedience as she learns to

<sup>28</sup> <https://mattersindia.com/2021/06/no-church-possible-without-women-religious/>, consulted 23/07/2021.

<sup>29</sup> <http://www.internationalunionsuperiorsgeneral.org/uisg-declaration-abuse-kinds/>, consulted 23/07/2021.

<sup>30</sup> <https://mattersindia.com/2021/06/no-church-possible-without-women-religious/>, consulted 20/07/2021.

<sup>31</sup> <https://www.thetablet.co.uk/news/14297/india-s-women-religious-demand-gender-justice>, consulted 20/07/2021.

place her life in the hands of others.”<sup>32</sup> Therefore, to put an end to patriarchy, there must not only be a conversion in the leadership of the Church but among all people, including women religious themselves.

The research of Missio Aachen places the patriarchal power structure and clericalism at the top of the list of “challenges in dealing with the issue of abuse of women religious.”<sup>33</sup> While the research in India was silent on sexual abuse,<sup>34</sup> the research of Missio Aachen obtained results mainly on sexual abuse. Both sets of research point to the same roots. “The positioning of women religious on the lowest rungs of the hierarchical structures of the Church makes them more vulnerable to gendered abuse. While secular women are waking up to call a spade a spade, women religious continue to suffer abuse under the cover of a very outdated theology of womanhood that takes submissiveness, self-sacrifice, and silent suffering as virtues of women.”<sup>35</sup>

Patriarchy and clericalism are also the main causes of sexual abuse of minors. Pope Francis did not mention patriarchy as the root of abuse, but clericalism.<sup>36</sup> However, both are linked. While patriarchy gives men power over women and children, ordination adds several elements to the power men already possess. First, women are excluded from ordination. Moreover, ordination gives a special status to the priest: he possesses sacramental and spiritual power. Sometimes priests abuse this power, if the sisters do not comply with their demands, by refusing to celebrate the sacraments. This “sacramental blackmail” is a spiritual abuse and should be punished strongly.<sup>37</sup>

<sup>32</sup> <https://international.la-croix.com/news/religion/sexual-abuse-often-begins-from-a-spiritual-relationship/9250>, consulted 20/07/2021.

<sup>33</sup> J. BECK-ENGELBERG, *Results of the Missio Survey*, 9.

<sup>34</sup> <https://www.globalsistersreport.org/news/news/news/webinar-airs-survey-results-hierarchical-exploitation-india-nuns>. “The study was ‘almost silent’ about clergy sexual abuse, she [Sr. De Souza] said, “because the respondents were major superiors and not the sisters in the field.” See also *The Tablet*: Mumbai-based theologian and writer Virginia Saldanha <https://www.thetablet.co.uk/news/14297/india-s-women-religious-demand-gender-justice>, consulted 28/06/2021: “Sexual abuse of sisters is another area that has still not been fully brought out into the open.”

<sup>35</sup> J. BECK-ENGELBERG, *Results of the Missio Survey*, 9; a quote about patriarchy and clericalism.

<sup>36</sup> Address by Pope FRANCIS at the opening of the synod of bishops on young people, the faith and vocational discernment, 3 October 2018. About clericalism, Pope Francis stated: “Clericalism arises from an elitist and exclusivist vision of vocation that interprets the ministry received as a power to be exercised rather than as a free and generous service to be given.... Clericalism is a perversion and is the root of many evils in the Church.” [https://www.vatican.va/content/francesco/en/speeches/2018/october/documents/papa-francesco\\_20181003\\_apertura-sinodo.html](https://www.vatican.va/content/francesco/en/speeches/2018/october/documents/papa-francesco_20181003_apertura-sinodo.html)

<sup>37</sup> <https://mattersindia.com/2021/06/no-church-possible-without-women-religious/> <https://mat-tersindia.com/2021/07/survey-highlights-hierarchical-exploitation-of-nuns-in-india/>

Some factors that facilitate abuse are specific to women religious, while others are shared in common with child sexual abuse. For example, both women and children were molested during the AIDS crisis because some people wanted to make sure their sexual partners were not infected. Moreover, in some regions of Africa, perpetrators believed that sexual intercourse with a virgin would cure AIDS.<sup>38</sup> But, since the abuse of women and children did not stop with the end of the HIV/AIDS epidemic, we cannot accept this reason as the root cause of the abuses. The patriarchal and clerical system plays a major role in the abuse of both women religious and children. For women, the fact that the priest is a man is added to the power dynamics, while for children, the fact that he is an adult must be considered. However, sacramental blackmail is specific to sisters, as is the expulsion of the women from their community and the misinterpretation of the vow of obedience.

#### 4 — *Dynamics in the Abuse of Religious*

Abusers of minors typically attempt to secure the complicity of their victims by grooming and cognitive distortions. These same dynamics are often at play in the sexual abuse of women religious. When reported, the abuse of women religious has often been met with silence and the attempt to cover it up.

##### 4.1 — Grooming

Grooming is a process whereby the perpetrator gradually establishes a “special” relationship with the potential victim and progressively crosses more significant boundaries. The perpetrator may offer the desired victim gifts or special attention. As a result, the perpetrator builds trust and affection, and the victims dare not refuse the perpetrator as he gradually violates more boundaries. If the victims push back, there may be a threat of withdrawal of attention or affection.<sup>39</sup>

Grooming is not limited to the victim. Instead, all those surrounding the victim are subject to it. After all, suspicion or mistrust must be avoided. With

<sup>38</sup> S. LECLERC-MADLALA, “On the Virgin Cleansing Myth: Gendered Bodies, AIDS and Ethnomedicine,” in *African Journal of Aids Research*, 1/2 (2002), 87-95.

<sup>39</sup> D. SUTTON and V. JONES, Save the Children Europe Group, *Position Paper on Child Pornography and Internet-related Sexual Exploitation of Children* (2004), available at [https://popcenter.asu.edu/sites/default/files/problems/child\\_pornography/PDFs/Sutton&Jones\\_2004.pdf](https://popcenter.asu.edu/sites/default/files/problems/child_pornography/PDFs/Sutton&Jones_2004.pdf) accessed 22/04/2021, 4, footnote 2.



women religious, the superior may be asked by the priest for permission to have a sister help him with a special task. Even with reservations, the superior may acquiesce due to the priest's history of generosity to the community.

Isolating the victim facilitates abuse. As one's social network falls away, the victim becomes increasingly dependent on the abuser. This dynamic is quite common in incest situations, in which one child becomes "daddy's princess," making the other children turn against her out of jealousy. A similar dynamic can play out in a woman's religious community.

## 4.2 — Cognitive Distortions

To overcome the resistance of the victim, the perpetrator may try to convince the intended victim with arguments to justify the behaviour. The perpetrator uses these cognitive distortions not only to convince himself of the rightness of his actions but to convince the other party to comply. For example, a father may tell his child that all fathers do the same thing; and a priest might tell a child that God wants him to be loved in a special way.

With religious sisters, the priest may argue that, while he cannot marry, he is allowed to have sexual relationships and even father children.<sup>40</sup> Some clerics will tell the sister that she should always obey priests, since they are men of God. Some will say that the sisters are intended to be at the disposal of priests. Insufficient training of the sisters contributes to this dynamic, but sometimes the grooming process is so subtle that the sister simply believes what she is told.

## 4.3 — Silence and Coverups

A secret "exists by the grace of a closed whole. It is supported by a limited group of people, who either have no interest in exposing the secret in the full light of day or, due to circumstances, are unable to bring it out into the open. Usually, an element of power or a misplaced sense of responsibility plays a role."<sup>41</sup> H. Beunders and H. Mossinkhof argue that the abuse of minors by clerics was an "open secret" for a long time with-

<sup>40</sup> O'DONOHUE, Personal Memo.

<sup>41</sup> H. BEUNDERS and H. MOSSINKHOF, "Publieke geheimen en de rol van de media," in E. BORGMAN and R. TORFS (eds.), *Grensoverschrijdingen geduid. Over seksueel misbruik in katholieke instellingen*, Valkhof Pers, 2011, 75-87, 84. Author's translation.

out being addressed. Those who reported it were considered to be attacking the Church and were ostracized. If survivors of child sexual abuse did denounce the abuse, they were often met with a coverup by members of the hierarchy.

There has been progress on this front with sexual abuse of minors but, for women religious, the dynamics of silence and coverup are still a reality. “Groups of sisters from local congregations have made passionate appeals for help to members of international congregations and explain that, when they themselves try to make representations to Church authorities about harassment by priests, they simply ‘are not heard’.”<sup>42</sup> This seems due to both fear of another international scandal and the overall devaluation of women in many cultures. This is coupled with the myth of the woman as the “seductress,” or the concept that any adult can refuse another adult’s sexual advances unless physical force is involved.

The abuse of adult women often meets with misunderstanding or denial, since it is presumed that the matter involves “two consenting adults.” But, are all relations between adults based on valid consent? Or are there cases in which there is a deprivation of liberty? It is necessary to identify the kinds of relationships that can exist between women religious and priests or male religious. First, women religious can meet priests in situations like a social gathering. In these circumstances, the power differential may be small to nonexistent, so a sexual relationship could involve mutual consent. Secondly, women religious and priests may work together on a particular project, in which they are equals. Again, in this case, inasmuch as the priest does not have a hierarchically higher position, a sexual relationship between colleagues could be based on mutual consent. This does not mean that there are no problems associated with both of these scenarios, especially since both parties have committed themselves to celibate chastity. This makes the relationship illicit, and keeping such a secret is often a burden both for the sister and for the man involved. Moreover, the relationship cannot lead to the foundation of a family, unless both seek to be dispensed from their prior commitments. However, what occurs most often, is that a woman religious finds herself in a subordinate position, dependent on the priest or male religious. This occurs when, for example, he is her employer or spiritual director. In this case, the power differential is such that consent is impossible and any sexual relationship is abusive by its very nature.

<sup>42</sup> M. O'DONOHUE, Memo from Sr. Maura O'Donohue MMM: Urgent Concerns for the Church in the Context of HIV/AIDS, [https://natcath.org/NCR\\_Online/documents/UrgentConcernsO'DONOHUE.htm](https://natcath.org/NCR_Online/documents/UrgentConcernsO'DONOHUE.htm), consulted 10/05/2021.

## 5 — *Present and Future Actions*

It takes courage to talk about abuse, not only because of the taboo nature of the subject, but also because many religious sisters say that they do not receive support on any level if they raise a complaint. As the Missio Survey reported: “Nothing much is done to address the issue because experiences of violation and exploitation that women religious encounter in their lives is not acknowledged as abuse. Besides, it works to the advantage of local Church authorities to keep women religious where they are because they remain a silent and silenced lot.”<sup>43</sup>

If there is to be a change in Church culture, the roots of abuse must be addressed. Both clerics and religious sisters and brothers must be educated about clericalism and how it conflicts with a Gospel that is about not power but service. The religious sisters’ overall intellectual formation must also be enhanced, as one woman religious has written. “We should train our young sisters in legal and human rights, theology, feminist theology, prophetic call and mission ... relevant church documents, emerging trends in spirituality and religious life, and feminist interpretation of the Bible....”<sup>44</sup>

Stringent guidelines for conduct and procedures for making complaints must not only be composed but rigorously enforced. Furthermore, support must be given to those who wish to file a complaint. The support must be financial, legal, and psychological as well as moral and spiritual. In addition, the victim must be protected against possible retaliation.

A humane solution must be found for sisters who are pregnant because of violation by a cleric or religious brother. While abortion is not an option, sending the religious away from her convent is a revictimization. Could the children possibly remain with their mothers in the religious community?

## *Conclusion*

Are women religious simply adults who should and could have said no? Are they the ones who seduce the priests? Or should we consider women religious as a vulnerable group? For various reasons, it may be difficult for a woman religious to say no to a priest. The power balance is often in the priest’s favor because of gender inequality, the sacramental and spiritual power conferred by ordination, the misinterpretation of the vow of obedience

<sup>43</sup> J. BECK-ENGELBERG, *Results of the Missio Survey*, 6.

<sup>44</sup> <https://mattersindia.com/2021/07/survey-highlights-hierarchical-exploitation-of-nuns-in-india/>

which places women into a subordinate position, and the often unequal formation between clergy and women religious.

The strategies used to persuade religious sisters into sexual encounters may not be obvious to them. Grooming, isolation, the imposition of silence, the use of threats, coercion, and sacramental blackmail are abuses of authority aimed at obtaining sexual favours. The negative repercussions often fall disproportionately on the shoulders of the sisters, including but not limited to banishment from their community, sexually transmitted diseases, pregnancy, and coerced abortion. Therefore, we must conclude that religious sisters are sometimes “vulnerable persons,” in the sense described by Pope Francis. But, there are cases in which the priest or male religious’ position of power plays little or no role; the religious sister may even be the protagonist. In these situations, there is no abuse of power involved but a consensual relationship. Still women religious often find themselves in what may be described as “vulnerable situations.” This is not because the women are weak but because of a variety of factors which keep them from being on equal footing with men, especially priests and male religious.

## THE OFFICE OF COADJUTOR BISHOP

BRIAN JOSEPH DUNN

**SUMMARY** — The A. first reviews historical developments connected with the office of coadjutor bishop, covering the periods prior to and after Gratian, the Council of Trent, and the 1917 *Code of Canon Law*. The Second Vatican Council made certain changes to the office of coadjutor bishop, and these were introduced into the 1983 *Code of Canon Law* and the 1990 *Code of Canons of the Eastern Churches*. The article concludes with some reflections and suggestions on the understanding and practice of the office of coadjutor bishop in today's Church.

**RÉSUMÉ** — Le A. passe d'abord en revue les développements historiques liés à la fonction d'évêque coadjuteur, couvrant les périodes avant et après Gratien, le Concile de Trente et le Code de droit canonique de 1917. Le Concile Vatican II a apporté certaines modifications à la fonction d'évêque coadjuteur, qui ont été introduites dans le Code de droit canonique de 1983 et le Code des canons des Églises orientales de 1990. L'article se termine par quelques réflexions et suggestions sur la compréhension et la pratique de la fonction d'évêque coadjuteur dans l'Église d'aujourd'hui.

### *Introduction*

One of the most inspiring gifts of Father Frank Morrissey, OMI was his sensitivity to the changes that had occurred or were occurring regarding the interpretation and implementation of canon law. He was frequently invited to present keynote addresses or to write articles on the topic of how canon law was changing or could be changed.<sup>1</sup> His influence has inspired me to

<sup>1</sup> For example, "Ten years of Liturgical Legislation (1963-1973)," in *StC*, 7 (1973), 289-308; "The Contribution of the Canadian Canon Law Society to the Life of the Church in Canada in its Twenty-Five Years of Existence," in *StC*, 25 (1991), 5-27; "The Spirit of the New Eastern Code of Canons," in *Logos*, 34 (1993), 200-219; "Decimo anno ... On the Tenth Anniversary of the Code of Canon Law," in *StC*, 28 (1994), 99-122; "The Latin and Eastern Codes and Possibilities for the Future," in *CLSAP*, 57 (1995), 17-33; "Twenty-five Years of the 1983 Code: Reflections on the Past; Thoughts on the Future," in *CLSAP*, 70 (2008), 1-27.

reflect now on the office of coadjutor bishop<sup>2</sup> and the changes connected with this office.

From the Middle Ages to the 1917 *Code of Canon Law*, through the Second Vatican Council to the 1983 *Code of Canon Law*, significant changes have occurred in the understanding and practice of the office of coadjutor bishop. In fact, as one considers the appointments of coadjutor bishops in Canada in recent years,<sup>3</sup> it is easy to recognize certain changes in the reasons for the appointment of a coadjutor bishop.

Historically, the appointment of a coadjutor was not always graciously accepted by the diocesan bishop. For example, in the Diocese of Antigonish, rumors circulated in February 1942 that the Holy See would appoint a coadjutor to the eighty-year-old Bishop Morrison to unburden his demanding schedule. While Bishop Morrison would have liked to have Bishop John R. MacDonald as coadjutor, since he had been a priest of Antigonish,<sup>4</sup> MacDonald had been appointed Bishop to the Diocese of Peterborough in June 1943. In 1944, the Apostolic Delegate mentioned that he wanted to appoint a coadjutor but he had promised Bishop Morrison that he would not do so without his consent. However, on 26 February 1944, in the centenary year of the Diocese of Antigonish, the Holy See appointed Bishop Morrison as archbishop *ad personam*,<sup>5</sup> while hinting that he retire or accept a coadjutor.

<sup>2</sup> This article will consider the Office of Coadjutor Bishop, but what is said of a coadjutor bishop applies, *mutatis mutandis*, to the Office of Coadjutor Archbishop. Sometimes writers refer to bishop coadjutor or archbishop coadjutor.

<sup>3</sup> Of the current bishops of Canada, these have served as Coadjutor Bishop or Archbishop: Archbishop Murray Chatlain, appointed on 23 June 2007 as Coadjutor Bishop of Mackenzie-Fort Smith, Northwest Territories; Thomas Christopher Cardinal Collins, appointed on 18 February 1999 as Coadjutor Archbishop of Edmonton, Alberta; Archbishop Marcel Damphousse, appointed on 6 May 2020 as Coadjutor Archbishop of Ottawa-Cornwall, Ontario; Archbishop Brian Joseph Dunn, appointed on 13 April 2019 as Coadjutor Archbishop of Halifax-Yarmouth, Nova Scotia; Archbishop Marcel André Joseph Gervais, appointed on 13 May 1980 as Coadjutor Archbishop of Ottawa, Ontario; Archbishop Sylvain Lavoie, O.M.I., appointed on 11 July 2005 as Coadjutor Archbishop of Keewatin-Le Pas, Manitoba; Bishop Blaise-Ernest Morand, appointed on 22 April 1981 as Coadjutor Bishop of Prince-Albert, Saskatchewan; Bishop Raymond Poisson, appointed on 18 May 2018 as Coadjutor Bishop of Saint-Jérôme, Québec; Bishop Raymond Saint-Gelais, appointed on 19 February 1988 as Coadjutor Bishop of Nicolet, Québec; and Bishop Joseph Edward Troy, appointed on 1 March 1984 as Coadjutor Bishop of Saint John, New Brunswick. Source: <http://www.catholic-hierarchy.org/country/ca.html>.

<sup>4</sup> James MORRISON to Ildebrando ANTONIUTTO, 14 June 1943, in Archives of the Diocese of Antigonish, Box 20, Fonds 4, Ser. 1, Subs. 1, Folder 125, Outgoing Correspondence June 1943 - September 1943, letter #27349.

<sup>5</sup> John Hugh MACDONALD to John R. MACDONALD, 13 March 1944, in Archdiocese of Edmonton Archives, Catholic Archdiocese of Edmonton Fonds, General Administrative records, Episcopal Relations records, Correspondence with other Dioceses in Canada, Antigonish.

By October 1944, Archbishop Morrison continued to lobby aggressively against a coadjutor. He was in reasonably good health and exercised his responsibilities relatively well, even though the apostolic delegate had promised some assistance in his “venerable age” “to provide for a government of continuity in the Diocese of Antigonish.”<sup>6</sup> Nonetheless, on 3 March 1945, Bishop MacDonald was appointed to Antigonish as a coadjutor bishop (with the right of succession), even though Archbishop Morrison had not received official notice from the apostolic delegate.<sup>7</sup> In the wake of the appointment, Archbishop Morrison wondered how he would fit in with “team work” and whether it might be better for him “to resign and retire to some monastery to prepare for the end.”<sup>8</sup> Meanwhile, the new coadjutor knew that Archbishop Morrison considered his presence a rebuke and had lobbied against a coadjutor.<sup>9</sup> Consequently, Bishop MacDonald received the appointment with mixed feelings, sad to leave his new diocese and with trepidation at returning to his home diocese.<sup>10</sup> Yet, Bishop MacDonald served as coadjutor bishop for five years until Archbishop Morrison’s death on 13 April 1950.<sup>11</sup> Similar scenarios have been repeated historically in any number of dioceses.<sup>12</sup>

<sup>6</sup> Ildebrando ANTONIUTTO to James MORRISON, 10 October 1944, in Archives of the Diocese of Antigonish, Box 66, Fonds 4, Ser. 2, Subs. 1, Folder 212, Incoming Correspondence, November 1944 - December 1944, letter #30967.

<sup>7</sup> James MORRISON to John R. MACDONALD, 15 April 1945, in Archives of the Diocese of Antigonish, Box 21, Fonds 4, Ser. 1, Subs. 1, Folder 130, Outgoing Correspondence January 1945 - May 1945, letter #28746.

<sup>8</sup> James MORRISON to James M. REARDON of Minnesota, 13 May 1945, in Archives of the Diocese of Antigonish, Box 21, Fonds 4, Ser. 1, Subs. 1, Folder 130, Outgoing Correspondence January 1945 - May 1945, letter #28797. Even before the appointment, Archbishop Morrison wondered about his capacity for “team-work” (James MORRISON to Francis J. WALL, 9 December 1944, in Archives of the Diocese of Antigonish, Box 20, Fonds 4, Ser. 1, Subs. 1, Folder 129, Outgoing Correspondence September 1944 - December 1944, letter #28491).

<sup>9</sup> At one point, Morrison complained to the Apostolic Delegate that adding a second bishop to his residence would mean that he lacked space for a single guest room (James MORRISON to Ildebrando ANTONIUTTO, 16 April 1945, in Archives of the Diocese of Antigonish, Box 21, Fonds 4, Ser. 1, Subs. 1, Folder 130, Outgoing Correspondence January 1945 - May 1945, letter #28747).

<sup>10</sup> John R. MACDONALD to John Hugh MACDONALD, 24 April 1945, in Archdiocese of Edmonton Archives, Catholic Archdiocese of Edmonton Fonds, General Administrative records, Episcopal Relations records, Correspondence with other Dioceses in Canada, Antigonish.

<sup>11</sup> Earlier in the history of the Diocese of Antigonish, Bishop Cameron served for seven years as coadjutor (11 March 1870 - 17 July 1877), even though Bishop MacKinnon had requested that Bishop Cameron be his coadjutor on two different occasions, in 1862 and 1867 (R.A. MACLEAN, *Bishop John Cameron. Piety and Politics*, Antigonish, Casket Printing and Publishing Co. Ltd., 1991, 34-36).

<sup>12</sup> For example, Cardinal Wiseman could not get along with his coadjutor bishop who had the right of succession and persuaded Pope Pius IX to deprive him of his coadjutorship in 1860

The coadjutor bishop is a special type of auxiliary bishop, with more authority than a regular auxiliary bishop but less authority than the diocesan bishop. Since the Second Vatican Council, the coadjutor has the right of succession, which means that, when the current bishop leaves office, the coadjutor automatically becomes the new bishop. The reality of a coadjutor bishop raises questions in relationship with auxiliary bishops as well as in connection with the diocesan bishop. How does one become a coadjutor bishop? Did the coadjutor bishop always have the right of succession? When does the coadjutor bishop succeed as diocesan bishop, and is there a ceremony for this transition? What are the canonical rights and obligations of the coadjutor bishop? This article will address these questions and trace some of the changes connected with this role, offering some future possibilities related to the office of coadjutor bishop.

## 1 — *Background*

A short history of coadjutor bishops may be helpful.<sup>13</sup> Bishops have had assistants in the discharge of their pastoral duties as early as the third and fourth centuries. In the East, *chorepiscopi* were priests or bishops who assisted the bishop in the rule of his diocese, similar to a coadjutor bishop. Various provincial councils dealt with *chorepiscopi* and noted that they could not ordain priests or deacons without the permission of the bishop (Neo-caesarea 314-325). They also were forbidden to interfere in the administration of churches (Syria 341). After the eighth century, the office of *chorepiscopus* declined and is seldom mentioned in later texts.<sup>14</sup>

In the West, there were clerics with limited episcopal powers, while the term *chorepiscopus* was not always used.<sup>15</sup> One of the most famous was St. Augustine. Bishop Megalius consecrated Augustine as coadjutor bishop to Bishop Valerius of Hippo in Africa in 395. This occurred even though the

(Gordon READ, "Title I Particular Churches and the Authority Constituted within Them [cc. 368-430]," in CLSGBI *Comm.*, 230, footnote 2) [= READ, CLSGBI *Comm.*].

<sup>13</sup> For a consideration of the history of coadjutor bishops, see Chas. AUGUSTINE, *A Commentary on the New Code of Canon Law*, Volume II, *Clergy and Hierarchy*, 4<sup>th</sup> Revised Edition, London, B. Herder Book Co., 1923, 378-383 [= AUGUSTINE, *Commentary*]; George LYNCH, *Coadjutors and Auxiliaries of Bishops: A Historical Synopsis and a Commentary*, Canon Law Studies, no. 238, JCD Dissertation, Washington, Catholic University of America, 1947, 3-31 [= LYNCH, *Coadjutors*].

<sup>14</sup> LYNCH, *Coadjutors*, 4-6.

<sup>15</sup> *Ibid.*, 6-12.



Council of Nicaea (c. 8) had forbidden the coexistence of two bishops in a see.<sup>16</sup> This Council acknowledged that the custom of having assistant bishops had consequences and the law needed to protect against a coadjutor bishop, especially given that two bishops were found within the same diocese. Various provincial councils dealt with the powers of these *chorepiscopi*, e.g., they were forbidden to confer confirmation (Paris 829), they were forbidden to consecrate churches or to confirm, and they were forbidden to rule a diocese during a vacancy (Meaux 845). By the eleventh century, the powers associated with *chorepiscopi* became extinct, even though the title became associated with other roles.

From the post-Gratian period to the Council of Trent, clear and explicit legislation was issued for coadjutor bishops.<sup>17</sup> The coadjutor bishop was appointed for the welfare of the bishop and the care of those in the diocese. The Holy See insisted that a bishop, hindered from performing his pastoral duties, should not be removed from office but given someone to assist him. While there were some examples where the local bishop was able to choose a coadjutor, Pope Boniface VIII declared that the granting of a coadjutor was reserved to the Holy See. However, exceptions to this were permitted in view of the distance from Rome, communication with the Holy See, and the good of the diocese. Moreover, for various reasons, especially to prevent a troubled election of an administrator, or to preserve episcopal sees against the invasion of territorial usurpers, or to prevent interference in the appointment of a suitable successor by secular authorities, it was often necessary to appoint a coadjutor for a bishop while he was living and active. The coadjutor would then occupy the diocese after the death of the incumbent. This practice was acknowledged by the popes, who reserved the right of granting such coadjutors. The Council of Trent stated that “if in some cathedral church or of a monastery there arises an urgent necessity and evident benefit that a prelate should be given a coadjutor, this appointment should not be with the right of succession unless the case has first been carefully considered by the pope and it is established that the person has all the qualifications required by law and the decrees of this council for bishops and prelates.”<sup>18</sup> This shows a tendency to limit the appointment of a coadjutor to cases of truly serious need. Finally, the office of coadjutor usually ended with the death of the bishop during the pre-Tridentine period, since the coadjutor did not have the right of succession.

<sup>16</sup> Hugh POPE, *St. Augustine of Hippo*, Garden City, NY, Image Books, 1961, 103.

<sup>17</sup> LYNCH, *Coadjutors*, 13-25.

<sup>18</sup> COUNCIL OF TRENT, Session XXV, Decree concerning Reform, Chapter VII; English translation Norman P. TANNER (ed.), *Decrees of the Ecumenical Councils*, Volume II, *Trent to Vatican II*, Washington, Georgetown University Press, 1990, 788.

After the Council of Trent, the office of coadjutor bishop with a right to succession was introduced but did not replace the office of temporary coadjutor. Upon the death of the bishop, both offices ended, and the coadjutor with the right of succession had full title to the benefice. Moreover, the powers and duties of coadjutor bishops were developed as applications of the general rules to particular cases by the Roman Congregations.

By the twentieth century, the teaching and legislation regarding coadjutors was summarized by Ethelred Taunton.<sup>19</sup> There were several kind of coadjutors: 1. by reason of duties assigned, a) temporal coadjutors, b) spiritual coadjutors, and c) temporal and spiritual coadjutors; 2. by reason of their tenure of office, a) temporary coadjutors, whose duties cease when the necessity for their help no longer exists, and b) permanent coadjutors, who have the right of succession and who are not appointed by the Holy See unless there is an urgent necessity or evident reason. Taunton reports that “in certain cases a bishop who is unable to discharge his own duties may, by Papal licences, and with the consent of his chapter or the diocesan counsellors, choose a temporary coadjutor. In case the bishop becomes insane, the chapter, by a two-thirds majority, may appoint such a temporary coadjutor until the Holy See provides.”<sup>20</sup>

The causes which required the appointment of a coadjutor included chronic or incurable disease of the ordinary, old age, insanity, or negligence. Regarding his powers, the coadjutor's apostolic letter would define his authority. If there was doubt, one must consider the reasons for the appointment. For example, in the case of an insane bishop, the coadjutor had full powers of administration, but he could not alienate property.<sup>21</sup> If the bishop was only infirm, the coadjutor could only do what the ordinary would allow. While the coadjutor bishop had the right to a salary, the Holy See fixed the amount and the source from which it was derived. The coadjutor with the right of succession became the diocesan bishop as soon as the see was vacant, presuming that he had already taken possession of his office of coadjutor bishop. Interestingly, the Second Council of Baltimore stated that the American bishops who held Church property in their own name should have the perpetual coadjutor in their will as legal heir. These were some of the provisions associated with coadjutor bishops before the 1917 *Code of Canon Law*.

<sup>19</sup> Ethelred TAUNTON, *The Law of the Church*, London, Kegan Paul, Trench, Trübner & Co. Ltd., 1906, 204-205.

<sup>20</sup> *Ibid.*, 205.

<sup>21</sup> *Ibid.*

## 2 — 1917 Code of Canon Law

As one reviews the canons on coadjutor bishops in the 1917 *Code of Canon Law*,<sup>22</sup> it is apparent that it made many adjustments to the various distinctions that had existed in the prior law. The legislation on coadjutor bishops in this Code began with canon 350, which stated:

§ 1. It is for the Roman Pontiff alone to constitute Coadjutor Bishops.

§ 2. Usually, a Coadjutor is given for the person of the Bishop with a right of succession; but one can also be given to the see.

§ 3. A Coadjutor given for the person of the Bishop without a right of succession is called by the special name of Auxiliary.<sup>23</sup>

This canon distinguished three kinds of coadjutor bishops: first, those given to the bishop with right of succession; second, those given to the episcopal see; third, those given to the person of the bishop without the right of succession (c. 350). Those of the first type were given to assist in episcopal jurisdiction and succeed the bishop in the government of the diocese after his death. Those of the second type were given to assist with the power of orders. Neither lost their office nor succeeded to the see, but they remained in the same subordinate position to the administrator of the diocese and to the new bishop. Those of the third type, strictly called auxiliary bishops, lost their office immediately on the vacancy of the see. These coadjutor bishops were called titular bishops, ordained to sees retained by schismatics and infidels, and called *episcopi in partibus infidelium*.<sup>24</sup> Thus, canon 350 spoke of two kinds of coadjutor bishops as well as auxiliary bishops. (In the 1983 *Code of Canon Law*, canon 403 legislates two kinds of auxiliary bishops and a single kind of coadjutor bishop.)

The Roman Pontiff had the exclusive right to appoint a coadjutor. Usually, the coadjutor was given to the person of the bishop with right of succession;

<sup>22</sup> PII X PONTIFICIS MAXIMI iussu digestus BENEDICTI PAPAE XV auctoritate promulgatus, *Codex Iuris Canonici*, P.J. Kennedy & Sons, 1918; English translation Edward N. PETERS, *The 1917 or Pio-Benedictine Code of Canon Law in English Translation*, San Francisco, Ignatius Press, 2001 [= PETERS]. For commentaries on this Code, see LYNCH, *Coadjutors*, 35-87; AUGUSTINE, *Commentary*; T. Lincoln BOUSCAREN and Adam C. ELLIS, *Canon Law: A Text and Commentary*, 3<sup>rd</sup> rev. ed., Milwaukee, The Bruce Publishing Company, 1961; Stanislaus WOYWOD, *A Practical Commentary of the Code of Canon Law*, rev. by Calistus SMITH, London, B. Herder, 1962.

<sup>23</sup> Canon 350 § 1. *Unius Romani Pontificis est Episcopo Coadiutorem constituere*; § 2. *Coadiutor dari solet personae Episcopi cum iure successionis; sed nonnunquam datur quoque sedi*. § 3. *Coadiutor, datus personae Episcopi sine iure successionis, speciali nomine dicitur Auxiliaris*; English translation, PETERS, 140-140.

<sup>24</sup> Leo XIII changed this designation to "titular bishop" (LEO XIII, Apostolic Letter *In suprema*, 10 June 1882, in AAS, 14 [1881], 529-536).

sometimes, however, he was given to the diocese. A coadjutor given to the person of the bishop without right of succession was called an auxiliary (c. 350). The apostolic letter of appointment provided the rights of a coadjutor given to the person of the bishop (c. 351 § 1). Specifically, the coadjutor had only such power as the bishop granted him, unless the apostolic letter provided otherwise; at the same time, a coadjutor given to a bishop who was entirely incapacitated had all the episcopal rights and duties (c. 351 § 2).

Acknowledging some of the uneasy history of the relationship between diocesan bishops and coadjutors, canon 351 § 3 stated that the bishop was not permitted to habitually delegate to another any work the coadjutor was able and willing to do.<sup>25</sup> Whenever his bishop requested him to do so, the coadjutor, unless he was prevented by some lawful impediment, was required to perform the pontifical and other functions the bishop himself would otherwise be bound to perform (c. 351 § 4). The coadjutor given to the diocese could exercise within the territory the functions which belong to the episcopal order, with the exception of ordination; in other matters, he had whatever power was committed to him by the Holy See or by the diocesan bishop (c. 352). Because the crozier is a special sign of jurisdiction, the coadjutor did not use the crozier unless permitted by virtue of his apostolic letter or by the consent of the diocesan bishop.<sup>26</sup>

Canon 353 dealt with the fact that the coadjutor had to take canonical possession of his office by showing the apostolic letter containing his appointment to the bishop, if the bishop was able to place human acts (i.e., as long as he realized the meaning of the act).<sup>27</sup> A coadjutor with the right of succession and a coadjutor given to the diocese also had to show the letter to the chapter of the cathedral church or the diocesan consultors (cc. 334 § 3, 427). Moreover, the coadjutor was obliged to reside in the diocese and, outside of vacation time (c. 338), he was not to absent himself except for a short time and with the permission of the bishop (c. 354). Finally, the coadjutor with the right of succession immediately became the ordinary of the diocese for which he was appointed, as soon as the episcopal see became vacant, provided that he had lawfully taken possession of his office according to canon 353 (c. 355). The office of an auxiliary expired with that of the bishop, unless the apostolic letter provided otherwise. If the coadjutor was given to the diocese, his office continued even after the see became vacant.

<sup>25</sup> This provision was rooted in a 1603 decision of the Congregation of Bishops and Regulars where a bishop had complained that his coadjutor was overstepping his authority in performing acts contrary to the wishes of the bishop (LYNCH, *Coadjutors*, 30).

<sup>26</sup> AUGUSTINE, *Commentary*, 381.

<sup>27</sup> *Ibid.*, 382.

### 3 — *Second Vatican Council*

The Second Vatican Council emphasised the doctrine on the sacramental nature of the episcopate (*Lumen gentium*, 20) and, as a result, increased the importance of bishops collaborating with the diocesan bishop.<sup>28</sup> The Council taught that episcopal ordination confers not only the office of sanctifying but also the offices of teaching and governing (*Lumen gentium*, 21). As well, episcopal ordination made all bishops members of the College of Bishops. The Decree on the Pastoral Office of Bishops in the Church, *Christus Dominus*, discussed the possibility of appointing auxiliary bishops as well as coadjutor bishops.

25. In the government of dioceses, the welfare of the Lord's flock must be the prime concern in any provisions relating to the pastoral office of bishops. That this welfare may be duly secured, auxiliary bishops must frequently be appointed because the diocesan bishop cannot personally fulfill all his episcopal duties as the good of souls demands. The problem may be the vast extent of the diocese, the great number of its inhabitants, the special nature of the apostolate or other reasons of a different nature. Sometimes, in fact, a particular need requires a coadjutor bishop be appointed to assist the diocesan bishop. Coadjutor and auxiliary bishops should be granted those faculties necessary for rendering their work more effective and for safeguarding the dignity proper to bishops. These purposes should always be accomplished without detriment to the unity of the diocesan administration and the authority of the diocesan bishop.

Since coadjutor and auxiliary bishops are called to share part of the burden of the diocesan bishop, they should exercise their office in such a way that they may proceed in all matters in single-minded agreement with him. In addition, they should always manifest obedience and reverence toward the diocesan bishop. He, in turn, should have a fraternal love for coadjutor and auxiliary bishops and hold them in esteem.

26. When the good of souls demands, the diocesan bishop should not decline to ask the competent authority for one or more auxiliaries who will be appointed for the diocese without the right of succession.

If there is no provision for it in the letter of nomination, the diocesan bishop should appoint his auxiliary or auxiliary bishops as vicars general or at least as episcopal vicars. They shall be dependent upon his authority only, and he may wish to consult them in examining questions of major importance, especially of a pastoral nature.

Unless competent authority has otherwise determined, the powers and faculties which auxiliary bishops have by law do not cease when the administration

<sup>28</sup> Remigiusz SOBANSKI, "Art. 3. Coadjutor and Auxiliary Bishops," in *Exegetical Comm*, Volume II/1, 860 (= SOBANSKI, *Exegetical Comm*).

of a diocesan bishop comes to an end. Unless some serious reasons persuade otherwise, it is also desirable that when the See is vacant, the office of ruling the diocese should be committed to the auxiliary bishop or, when there are more than one, to one of the auxiliaries.

A coadjutor bishop, appointed with right of succession, must always be named as vicar general by the diocesan bishop. In particular cases the competent authority can grant even more extensive faculties.

In order to provide as far as possible for the present and future good of the diocese, the diocesan bishop and his coadjutor should not fail to consult with one another on matters of major importance.<sup>29</sup>

This decree makes some changes regarding coadjutor and auxiliary bishops: both are appointed to the diocese and not to the bishop.<sup>30</sup> As a result, the powers and faculties that auxiliary bishops have by law do not cease when the office of the diocesan bishop comes to an end; the coadjutor always has the right of succession, thus eliminating the situation where a coadjutor bishop would not have the right of succession; the coadjutor bishop should always be appointed a vicar general.

After the Council, Pope Paul VI issued *Ecclesiae sanctae* I to implement the directives of *Christus Dominus*. While this document did not mention coadjutor bishops, it did enunciate some principles applicable to the coadjutor bishop.

13. (1) It is necessary to name auxiliary bishops for a diocese whenever the genuine needs of the apostolate exercised in the diocese demand it. When there is question of the powers to be conferred on the Auxiliary Bishop, the chief to be kept in mind are: the pastoral care of the Lord's flock, the unity of government in the diocese, the position of the Auxiliary as a member of the Episcopal College, and his effective cooperation with the bishop of the diocese.<sup>31</sup>

Like the auxiliary bishop, the coadjutor bishop must be conscious of contributing to the unity of the pastoral governance of a diocese, of acting as a member of the episcopal college, and of cooperating effectively with the

<sup>29</sup> SECOND VATICAN COUNCIL, Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*, 28 October 1965, nn. 25-26; English translation ABBOTT, 414-415.

<sup>30</sup> However, the "reports concerning episcopal appointments published in AAS until 1989 treat titular bishops as granted to the diocesan bishop. From 1991 on, the tendency has been to consider them as granted to the particular church" (SOBANSKI, *Exegetical Comm*, 862, footnote 7).

<sup>31</sup> PAUL IV, Apostolic Letter m.p. establishing norms to implement some decrees of Vatican II *Ecclesiae sanctae*, 6 August 1966, in AAS, 58 (1966), 757, n. 13; English translation, CLD, Volume VI, 271-272.

bishop of the diocese, all for the purpose of the well-being and nourishment of the people of the diocese.

After the Second Vatican Council, the process for the revision of the *Code of Canon Law* began. During this process, there was an extensive discussion about whether the coadjutor bishop should automatically enjoy the right of succession, especially because this might unduly circumscribe the administrative freedom of the Holy See.<sup>32</sup> This discussion arose because the original schema had made the right of succession optional. The committee decided that it was inappropriate for the coadjutor not to have the right of succession as it was envisaged by *Christus Dominus* 26. When the 1983 *Code of Canon Law* was promulgated, the coadjutor bishop had the right of succession. As a consequence, the Sacred Congregation for Bishops ruled that the titular see for the coadjutor would no longer be a see *in partibus infidelium*.

... on the occasion of the appointment of a coadjutor “with the right of succession” in the Latin Church, the title of the extinct see is no longer attributed to him. Held as sufficient is the designation “now for then” of the particular church for which he is destined. [...] I now wish to indicate to you that the real bond which is established between the coadjutor and the church to which he will have to succeed, finds his responsibility deriving, without giving rise to the problems of sensitivity connected with coadjutor (given the different kinds of nomenclature) or limited promises for the future, from the moment that the coadjutor, like every other diocesan bishop, can always be transferred to another residential or titular see.<sup>33</sup>

Thus, while some titular bishops are appointed to a titular see, e.g., auxiliary bishops, coadjutor bishops are given the title of the see where they will be succeeding.

The Holy See issued other documents with consequences for coadjutor bishops. For example, the Sacred Congregation of Rites issued an Instruction which permitted every bishop to use the crozier when, with the consent of the local bishop, he celebrates pontifically.<sup>34</sup> Moreover, the Secretary of State permitted bishops, including coadjutor bishops, to create coats-of-arms drawn up in accord with the norms of the art of heraldry.<sup>35</sup>

<sup>32</sup> For a discussion of this issue, see *Comm*, 7 (1975), 161-172.

<sup>33</sup> SACRED CONGREGATION OF BISHOPS, letter to Sacred Council for the Public Affairs of the Church, 31 August 1976, Prot. N. 335/67, in *Comm*, 9 (1977), 223; English translation, *CLD*, Volume VIII, 252-253.

<sup>34</sup> SACRED CONGREGATION OF RITES, Instruction *Pontificales ritus*, 21 June 1968, n. 19, in AAS, 60 (1968), 406-412; English translation, *CLD*, Volume VII, 376-382.

<sup>35</sup> SECRETARY OF STATE, Instruction *Ut sive sollicitate*, 31 March 1969, in AAS, 61 (1969), 334-340; English translation, *CLD*, Volume VII, 137-143.

#### 4 — 1983 Code of Canon Law

The changes in the law on coadjutor and auxiliary bishops that were enacted at Vatican II and during the post-conciliar period were to influence the 1983 *Code of Canon Law*. Canons 403-411 provide legislation governing the auxiliary bishop, the auxiliary bishop endowed with special faculties by the Holy See, and the coadjutor bishop. Certain general principles rooted in Vatican II are found in these canons: “the need to provide for the pastoral needs of the diocese; the importance of respecting the integrity of the episcopal status of the coadjutor or auxiliary; and the necessity of fostering unified diocesan government and a close working relationship between the diocesan bishop, the key authority figure, and his coadjutor and/or auxiliaries.”<sup>36</sup> Canon 403 states:

§1. When the pastoral needs of a diocese suggest it, one or more auxiliary bishops are to be appointed at the request of the diocesan bishop. An auxiliary bishop does not possess the right of succession.

§2. In more serious circumstances, even of a personal nature, an auxiliary bishop provided with special faculties can be given to a diocesan bishop.

§3. If it appears more opportune to the Holy See, it can appoint *ex officio* a coadjutor bishop who also has special faculties. A coadjutor bishop possesses the right of succession.<sup>37</sup>

The coadjutor bishop is similar to the auxiliary bishop mentioned in canon 403 §2. At the same time, the coadjutor differs from the auxiliary bishop because the coadjutor bishop is entitled to automatic succession when the see falls vacant (c. 403 §3). In fact, the essential difference between the coadjutor bishop and the auxiliary bishop consists in the fact that the coadjutor is always appointed with the right of succession, whereas this right is never possessed by the auxiliary bishop (c. 403 §1).

The 1983 Code suppresses the former distinction between the coadjutor given to the person of the bishop, with or without the right of succession, and the coadjutor given to the see. Formerly, since the bishop remained in office until death, it was necessary to deal with the possible incapacity of the bishop either with a coadjutor bishop or an apostolic administrator. Thus, before his death, the coadjutor could stand in for the diocesan bishop. Meanwhile, the 1983 Code no longer mentions the apostolic administrator.<sup>38</sup>

<sup>36</sup> T.J. GREEN, commentary on canons 368-430, in *CLSA Comm1*, 337 (= GREEN, *CLSA Comm1*).

<sup>37</sup> *Code of Canon Law*, Latin-English Edition, Washington, Canon Law Society of America, 2020.

<sup>38</sup> GREEN, *CLSA Comm1*, 346.



## 4.1 — Appointment

Canon 403 §3 mentions that the Holy See can appoint a coadjutor *ex officio* where there are reasons that advise it (e.g., the health of the diocesan bishop). At the same time, canon 377 §§2-3 notes the process when a diocesan bishop may seek a coadjutor. Canon 377 §§2-3 states that the bishops of an ecclesiastical province should submit a list of priests to the Apostolic See. For the appointment of a diocesan bishop or a coadjutor bishop, the papal legate seeks the suggestions of the metropolitan of the see in question, the suffragan bishops, the president of the conference of bishops, the college of consultors, the chapter of canons (if they are present), other clerics, and some lay people. In contrast, for the appointment of an auxiliary bishop, the diocesan bishop proposes a list of three names to the Apostolic See (c. 377 §4). Thus, the appointments of the diocesan bishop and the coadjutor bishop involve the same process. Canon 405 §2 mentions that the coadjutor bishop can be given the governance of the diocese when the bishop is absent or impeded. In light of the nature of a coadjutor bishop, it is not envisioned that more than one coadjutor be appointed in a diocese.

While canon 350 §§2-3 of the 1917 Code spoke of a coadjutor or an auxiliary given to the person of the bishop, the 1983 Code no longer makes that distinction, and both auxiliary and coadjutor bishops are named for the particular diocese. The auxiliary bishop with special faculties mentioned in canon 403 §2 could be appointed because of factors in the diocese or factors with the bishop, e.g., not just age or illness, but also because of other obligations entrusted to the bishop.

The reasons for appointing a coadjutor bishop usually lie in the person of the bishop, but other reasons might include the prevention of difficulties in the future provision of the episcopal see. Some authors consider the granting of a coadjutor bishop as exceptional.<sup>39</sup> When the coadjutor bishop is named, if he has been a diocesan bishop, his see becomes vacant the day he takes canonical possession of his office as coadjutor bishop. From the time of the publication of the coadjutor bishop's appointment until he takes possession of his office, the new coadjutor bishop obtains in his diocese *a quo* the power and obligations of a diocesan administrator. Although the diocese does not become vacant until the transferred bishop takes possession of his office in his new diocese *ad quem*, the faculties of the vicar general and episcopal vicars cease with the publication of the coadjutor bishop's appointment, but he may confirm their faculties in his capacity as diocesan administrator.<sup>40</sup>

<sup>39</sup> SOBANSKI, *Exegetical Comm*, 863; READ, *CLSGBI Comm*, 230.

<sup>40</sup> CONGREGATION FOR BISHOPS, Directory for the Pastoral Ministry of Bishops, *Apostolorum successores*, 22 February 2004, Ottawa, CCCB Publications, 2004, n. 233 [= *Apostolorum successores*]; canon 418 §2.

Once the diocese is vacant with the taking possession of the office of coadjutor bishop, the Roman Pontiff may appoint the coadjutor bishop as the apostolic administrator to provide for the governance of his former diocese. In this situation, the coadjutor bishop must assess with his new diocesan bishop the obligations that he has as coadjutor bishop in his new diocese, with the obligations he has as apostolic administrator in his former diocese. As apostolic administrator, he may be granted all the faculties of a diocesan bishop, but the diocese continues to be vacant. Thus, the offices of the vicar general and the episcopal vicars cease, as well as the functions of the presbyteral and diocesan pastoral councils. The apostolic administrator may confer delegated power upon the vicar general and episcopal vicars until the new bishop takes possession of the see, but he may not extend the duties of the councils, since their functions are fulfilled by the college of consultors.<sup>41</sup>

## 4.2 — Taking Possession of the Office

Canons 403-411 refer to the office (*officium*) of coadjutor bishop, and they describe the functions of the coadjutor bishop held in an objectively stable manner. There are duties that result from these functions, and the canons describe a number of rights and obligations of the office; the diocesan bishop can assign additional faculties by a special mandate. Thus, the coadjutor bishop is an office in the juridical sense (c. 145).<sup>42</sup> Canon 404 provides for the taking possession of this office.

§1. A coadjutor bishop takes possession of his office when he, either personally or through a proxy, has shown the apostolic letter of appointment to the diocesan bishop and college of consultors in the presence of the chancellor of the curia, who records the event.

§3. If the diocesan bishop is completely hindered, however, it suffices that both a coadjutor bishop and an auxiliary bishop show the apostolic letter of appointment to the college of consultors in the presence of the chancellor of the curia.

The taking possession of the office occurs when the coadjutor bishop presents his apostolic letter of appointment, either personally or by proxy, to the diocesan bishop and to the college of consultors in the presence of the chancellor or, if the bishop is impeded, only to the college of consultors. The involvement of the college of consultors is similar to the situation when a

<sup>41</sup> *Apostolorum successores*, n. 244.

<sup>42</sup> See SOBANSKI, *Exegetical Comm*, 866-867 and LYNCH, *Coadjutors*, 40-42. Although, subjectively, the coadjutor functions temporarily only until the vacancy of the diocese, the office itself as a juridical institute is, objectively, a *munus ordinatione stabiliter constitutum* (c. 145 § 1).

diocesan bishop is named to a vacant diocese; he presents his apostolic letter to the college of consultors. Since there is no vacancy with the coadjutor bishop, he presents his letter not only to the diocesan bishop but also to the college of consultors. The chancellor is required to make a written record of the fact of the possession of the office and to ensure the preservation of the record in the curia (c. 404 § 1).

Once the coadjutor bishop is named, he must receive episcopal ordination (c. 379), if he is not already ordained. He must make the Profession of Faith and swear the Oath of Fidelity to the Apostolic See (cc. 380 and 833, 1°). He must take possession of his office within four months of receiving his apostolic letter, if he has not been ordained a bishop, or within two months, if he already has episcopal ordination (c. 382 § 2). Interestingly, the auxiliary bishop takes possession of his office by showing his letter of appointment to the diocesan bishop in the presence of the chancellor; there is no mention of the college of consultors, and he does not have the possibility of presenting his letter by proxy. If the coadjutor has not been ordained bishop and the see becomes vacant, he becomes the diocesan bishop at his ordination, whereby he takes possession of the diocese as diocesan bishop rather than coadjutor bishop.

Once he takes possession of his office, he no longer has the title of his former diocese (if he was a diocesan bishop) or his titular see (if he had that title, for example, as an auxiliary). It is strongly recommended that the act of taking canonical possession be performed with a liturgical service in the cathedral church (c. 382 § 4).<sup>43</sup> Since the coadjutor bishop will eventually become the diocesan bishop, it seems appropriate to take possession in a manner similar to a diocesan bishop.<sup>44</sup> Once he takes possession of the office, he is incardinated into the new diocese and excardinated from his former diocese, according to his apostolic letter of appointment. From the day the coadjutor bishop takes possession of his office, his name may be mentioned in the Eucharistic prayer by all presbyters who celebrate Mass within the diocese, even in the churches and oratories of exempt religious.<sup>45</sup>

<sup>43</sup> While there is no prescribed liturgical service for the coadjutor as he takes possession of his office, a liturgical service may be prepared using some elements taken from the ceremony for the "Reception of the Bishop in his Cathedral Church," in *Ceremonial of Bishops*, Collegeville, The Liturgical Press, 1989, nn. 1141-1145.

<sup>44</sup> John A. RENKEN, *Particular Churches and the Authority Established in Them. Commentary on Canons 368-430*, Ottawa, University of Saint Paul, 2011, 212 [= RENKEN, *Particular Churches*].

<sup>45</sup> SACRED CONGREGATION OF DIVINE WORSHIP, Decree *Cum de nomine*, 9 October 1972, in AAS, 64 (1972), 692-694; English translation in *Documents on the Liturgy 1963-1979: Conciliar, Papal, and Curial Texts*, Collegeville, Liturgical Press, 1982, document 247, page 623, par. 1972. See also Ivan GRIGIS, "Regarding the Mention of the Bishop in the Eucharistic Prayer,"

If the coadjutor bishop is the main celebrant at Mass, he mentions the diocesan bishop first and then himself, for ecclesial communion is established through the diocesan bishop. While the Code does not mention the obligation of the *Missa pro populo* (c. 388) for a coadjutor bishop,<sup>46</sup> he certainly has the moral obligation to pray for his diocese as he prays the Liturgy of the Hours and celebrates the Eucharist.

What if the diocesan bishop dies before the coadjutor bishop has taken possession of his office? Presuming that he is already ordained, the coadjutor bishop takes possession of his office by showing his apostolic letter to the college of consultors (c. 382 §§ 2-3). If the diocese becomes vacant for any other reason before the coadjutor bishop has taken possession of his office (i.e., resignation, transfer, or deprivation of office), then the Apostolic See would be involved in making the decision about canonical possession of the office.<sup>47</sup>

### 4.3 — Rights and Obligations

Coadjutor bishops enjoy the rights and obligations that arise because of episcopal ordination and participation in the College of Bishops. They have the right and obligation to take part in an ecumenical council with a deliberative vote (c. 339 § 1); they may be elected to take part in the general or special assembly of the Synod of Bishops (c. 346); they must be summoned to and have a deliberative vote in a particular council, whether plenary or provincial (c. 443 § 1, 2°); they must be summoned to and have a deliberate vote in the diocesan synod (c. 463 § 1, 1°); they belong to the conference of bishops by the law itself and have a deliberative vote in plenary meetings (c. 454 § 1) and a deliberative vote in the making or changing of the statutes of the conference (c. 454 § 2); auxiliary bishops have a deliberative vote depending on the statutes of the conference.<sup>48</sup> Since coadjutor bishops are appointed as vicars general (c. 406 § 1),

in *Notitiae*, 45 (2009), 308-320; *Ceremonial of Bishops*, n. 1147; *The Roman Missal*, The General Instruction of the Roman Missal, Ottawa, Concacan Inc., 2011, n. 149. If there is a coadjutor or one auxiliary, the priest celebrant may mention him by name if he wishes: “N., our bishop, and P., our Coadjutor (or auxiliary).”

<sup>46</sup> Commentators on the 1917 Code held that the coadjutor did not have to fulfill the obligation of the *Missa pro populo* (LYNCH, *Coadjutors*, 62).

<sup>47</sup> SOBANSKI, *Exegetical Comm*, 878.

<sup>48</sup> According to the Statutes of the Canadian Conference of Catholic Bishops, all auxiliaries have a deliberative vote, unless otherwise provided by universal law or the Statutes of the Conference (CANADIAN CONFERENCE OF CATHOLIC BISHOPS, Statutes, No: 2020-02, 26 October 2020, n. 12, 1°). “The great majority of the statutes of the European Bishops’ Conferences grant auxiliary bishops a deliberative vote, except in the voting to create or modify the statutes, in accordance with c. 454, §2” (SOBANSKI, *Exegetical Comm*, 864, footnote 12).

they have all the rights and obligations of vicars general (cc. 475-481); as vicars general, they belong to the episcopal council (c. 473 §4). While auxiliary bishops cannot serve as presidents or pro-presidents of the conference of bishops or a gathering of bishops of an ecclesiastical region of canon 434,<sup>49</sup> coadjutor bishops may serve in these roles.

Canons 405-408 deal with particular rights and obligations of the coadjutor bishop (and auxiliary bishop). He assists the diocesan bishop with the entire governance of the diocese and takes his place when he is absent or impeded. It is reasonable that the coadjutor be given certain responsibilities so that he can begin to be involved in this governing role by considering the issues connected with personnel, or other specific duties that are necessary at the moment. At the same time, being involved in these governing responsibilities must not diminish the unity of the governance exercised by the diocesan bishop. It is important to note that the functions mentioned in the letter of appointment are delegated and are not found in the law as such, except the right of succession. Thus, all the rights and obligations must be exercised within the context that recognizes that the diocesan bishop is the pastor and the head of the diocese. At the same time, the coadjutor bishop belongs with the diocesan bishop to the College of Bishops. Moreover, the coadjutor bishop must be appointed as a vicar general (c. 406 §1) by the diocesan bishop.<sup>50</sup> His appointment as coadjutor bishop does not confer on him the office of local ordinary;<sup>51</sup> this comes with his appointment as vicar general. As a result, his power of governance is vicarious, not proper (c. 131), so he shares in the pastoral ministry of the diocesan bishop. This does not prevent the diocesan bishop from appointing another vicar general, but everything requiring a special mandate must be entrusted to the coadjutor bishop (c. 479 §1) before someone else.

The diocesan bishop may entrust to the coadjutor bishop some competencies which by law require a special mandate. The following list identifies some rights and duties which belong by law to the diocesan bishop but which may be delegated to the coadjutor bishop by a special mandate:

- issues connected with seminarians (cc. 241 §1; 259 §2; 1025 §§1-2; 1029; 1052 §1; 1032 §2; 1034 §1; 1036; 1039);

<sup>49</sup> PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, *Responsio ad propositum dubium*, 23 May 1988, in AAS, 81 (1989), 388. For an English translation of this reply and a commentary, see Lawrence WRENN, *Authentic Interpretations on the 1983 Code*, Washington, Canon Law Society of America, 1993, 52-54.

<sup>50</sup> RENKEN, *Particular Churches*, 211.

<sup>51</sup> John A. RENKEN, "Title I Particular Churches and the Authority Established in Them [cc. 368-430]," in CLSA *Comm2*, 543 [= RENKEN, CLSA *Comm2*].

- issues connected with incardination/excardination (cc. 267 § 1; 268 § 1; 269; 271);
- issues connected with the diocesan finance council (cc. 492 § 1; 494 § 3);
- issues connected with the presbyteral council, college of consultors, or diocesan pastoral council (cc. 496; 497, 3°; 500-501; 502; 511-514);
- issues connected with consecrated life (cc. 678 § 3; 681; 686; 688 § 2; 691 § 2; 733 § 1);
- issues connected with catechesis and religious education (cc. 775 § 1; 777; 804 § 1);
- issues connected with sacraments (cc. 860 § 2; 863; 884 § 1; 961 § 2; 1002; 1017);
- issues connected with the administration of goods (cc. 1277; 1281 § 2).<sup>52</sup>

Canon 408 notes that the coadjutor bishop has an obligation to perform the pontifical and other functions of the diocesan bishop when requested. These functions may not be habitually entrusted to another bishop. This changes the norm of the 1917 Code (c. 351), which provided that this would occur if the coadjutor bishop “can and wants” to exercise these functions. The 1983 Code makes this an obligation rather than an act of goodwill.<sup>53</sup> These other functions include presiding at the Eucharist at the cathedral (c. 389); the pastoral visitation of the diocese (c. 396 § 1); the making of the *ad limina* visit, if the diocesan bishop is impeded (c. 400, § 2); and the fact that the governance of the diocese falls to the coadjutor bishop in the case of an impeded see (cc. 412, 413 § 1).

Canon 410 states that the coadjutor bishop is bound to reside in the diocese and must not be away other than for the fulfillment of some duty outside the diocese, for his month of vacation, or for a brief period. Some of these duties might include participating in a council or a meeting of the conference of bishops. If the coadjutor bishop has been appointed as the apostolic administrator of his former diocese, this would also be a duty outside the diocese, and the coadjutor bishop should discuss this with the diocesan bishop of his new diocese. While the diocesan bishop is obliged by canon 395 § 3 to be present in his diocese on Christmas, during Holy Week, on Easter, Pentecost, and Corpus Christi, no such obligation is found for the coadjutor or auxiliary bishop; however, they would likely observe this discipline.<sup>54</sup> If the coadjutor bishop is to be away from the diocese, does he first

<sup>52</sup> For a more complete list, see “Appendix II – 1983 Code References to the Diocesan Bishop,” in RENKEN, CLSA *Comm*2, 559-562; NCCB, *A Manual for Bishops: Rights and Responsibilities of the Diocesan Bishop in the Revised Code*, rev. ed., Washington, NCCB, 1992.

<sup>53</sup> SOBANSKI, *Exegetical Commentary*, 876.

<sup>54</sup> RENKEN, *Particular Churches*, 220, footnote 31.

need the consent of the diocesan bishop? While the present law does not oblige this, the schema of 1977 did. This requirement was removed in the 1980 Schema, even though it was thought that the diocesan bishop should at least be informed.<sup>55</sup> The coadjutor may be absent for a brief period, which is interpreted as about a week.<sup>56</sup> If the coadjutor is illegitimately absent, he may be subject to the penalty connected with the violation of the obligation of residence and may be punished with a just penalty, including privation from office (cc. 1396; 1405 §1, 3°).

#### 4.4 — Unity of Governance

One of the difficult issues connected with the coadjutor bishop has to do with the maintenance of the unity of governance in the diocese. This concern was raised in *Christus Dominus*, 26. While the coadjutor bishop and the diocesan bishop do not constitute a collegiate body, they must exercise their functions “collegially.” They must consult each other on matters of great importance (c. 407 § 1), but not with the same consultation needed for the validity of juridic acts (c. 127). Instead, Vatican II highlighted the importance of consultation between the coadjutor and the diocesan bishop, but it did not mention that between the auxiliary and the diocesan bishop. During the revision of the Code, it was noted that consultation with the coadjutor is necessary (c. 407 § 1), while consultation with the auxiliary is merely appropriate (c. 407 § 2).<sup>57</sup> This consultation provides an immediate antidote against any possible competition, friction, or hostility between the diocesan bishop and the coadjutor bishop, for they are called to address together the spiritual well-being of the diocese and work together for the good of the Church. Some matters that might be considered of great importance include the establishment, suppression, or altering of parishes (c. 515 § 2); the building of churches (c. 1215 § 2); the reduction of a church to profane use (c. 1222); the levying of a diocesan tax (c. 1263); and the more important acts of administration (c. 1277). The diocesan and coadjutor bishops must seek the advice of each other, and the diocesan bishop must undertake his initiatives in such a way that it will assist the future pastoral task of the coadjutor.

<sup>55</sup> COETUS STUDIORUM *DE POPULO DEI*, session of 15 March 1980, in *Comm*, 12 (1980), 313-314.

<sup>56</sup> READ, *CLSGBI Comm*, 234; AUGUSTINE, *Commentary*, 382-383.

<sup>57</sup> *Comm*, 24 (1992), 40.

The 2004 Directory for the Pastoral Ministry of Bishops describes the relationship between the coadjutor bishop and the diocesan bishop.

When circumstances so suggest, the Holy See may appoint a coadjutor Bishop. The diocesan Bishop should welcome him gladly in a spirit of faith and should promote an effective communion by virtue of their joint episcopal responsibility, establishing an authentic partnership which, with a coadjutor, should be particularly cordial and fraternal for the good of the diocese.

The diocesan Bishop should always remember that the coadjutor Bishop has the right of succession and is therefore to act in full agreement with him, so that the future exercise of the coadjutor's own pastoral ministry is unimpeded.<sup>58</sup>

Through various consultations, the coadjutor bishop participates in the ministry of the diocesan bishop and, like any vicar general, acts according to the mind and will of the diocesan bishop (c. 480).

#### 4.5 — From Coadjutor to Diocesan Bishop

Canon 409 states that, when the episcopal see falls vacant, the coadjutor becomes the bishop of the diocese for which he was appointed, provided that he has taken possession of the office.<sup>59</sup> This vacancy arises through the diocesan bishop's death, his resignation accepted by the Roman Pontiff, his transfer, or deprivation from office (c. 416). The presence of a coadjutor bishop, therefore, ensures that there is no period during which the episcopal see is vacant. Under this arrangement, the transfer of authority to a new diocesan bishop from his predecessor is as seamless as possible. The Directory for the Pastoral Ministry of Bishops provides some clarification as to the time of the transfer: "From the time of the publication of the Roman Pontiff's acceptance of the resignation, the diocesan Bishop assumes, *ipso iure*, the title of Bishop Emeritus of the said diocese" (n. 225). This is also the time when the coadjutor becomes the diocesan bishop. While there is no liturgical celebration provided for this transition, it is fitting that a liturgical celebration take place to acknowledge both the resignation of the diocesan bishop and the coadjutor becoming the new bishop.<sup>60</sup> While there is no prescribed liturgical service for the coadjutor as he becomes the diocesan bishop, a liturgical service may be prepared using some elements taken from the ceremony for the "Reception of the Bishop in his Cathedral Church" in the *Ceremonial of Bishops*.<sup>61</sup>

<sup>58</sup> *Apostolorum successores*, n. 72.

<sup>59</sup> *Ibid.*, n. 234.

<sup>60</sup> The *Ceremonial of Bishops*, n. 1156 suggests that a resigned bishop would gather his people at a liturgical service.

<sup>61</sup> "Reception of the Bishop in his Cathedral Church," in *Ceremonial of Bishops*, nn. 1141-1145.



When there is a vacancy, the auxiliary bishop loses his office of vicar general, but the law gives him the powers and faculties that he enjoyed before the vacancy. When the see has a new diocesan bishop, he must reappoint the auxiliary bishop as vicar general.

#### 4.6 — Resignation/Retirement

Canon 411 deals with the resignation from office of the coadjutor or auxiliary bishop.<sup>62</sup> These resignations follow the same provisions of the resignation of the diocesan bishop (i.e., submission of a letter of resignation at the age of seventy-five years, the possibility of having a residence in the diocese, and the provision of a suitable and worthy upkeep by the diocese). Just as the diocesan bishop can be affected by illness or other grave reason that makes him unsuited for the fulfillment of his office, so the auxiliary or coadjutor bishop likewise might become unsuited. After their resignation is accepted, they would be called “auxiliary bishop emeritus of N. see” or “coadjutor bishop emeritus of N. see.”

A retired coadjutor bishop has a right to be consulted on questions of a general nature; he has a right to be a co-opted member or consultor of the various dicasteries of the Roman Curia; he has a right to be considered as a candidate for the Synod of Bishops; he has a right to be informed and consulted about themes where retired bishops might be competent; he has a right to be kept informed about, and to receive materials from, the diocese from where he retired; and he has a right that careful provision be made for his financial well-being.<sup>63</sup>

### 5 — *Code of Canons of the Eastern Churches*

The *Code of Canons of the Eastern Churches*<sup>64</sup> has seven canons in its section on Coadjutor Bishops and Auxiliary Bishops (cc. 212-218). Canon

<sup>62</sup> For a consideration of the extensive rights of a retired bishop, see George D. GALLARO, “The Bishop Emeritus: An Ecclesial Consideration,” in *Jur*, 66 (2006), 374-389; W. Becket SOULE, “The Canonical Status of an Ordinary Emeritus,” in *StC*, 51 (2017), 611-620.

<sup>63</sup> CONGREGATION FOR BISHOPS, Norms on Bishops Leaving Office, 31 October 1988, in *Comm*, 20 (1988), 167-168; English translation, *CLD*, Volume XIII, 238-239.

<sup>64</sup> *Code of Canons of the Eastern Churches*, Latin-English Edition, Washington, Canon Law Society of America, 2001. For commentaries on this Code, see John D. FARIS, *The Eastern Catholic Churches: Constitution and Governance according to the Code of Canons of the Eastern Churches*, New York, Saint Maron Publications, 1992, 470-480 [= FARIS, *The Eastern Catholic Churches*]; Victor J. POSPISHIL, *Eastern Catholic Church Law according to the*

212 identifies two kinds of bishops who serve with the eparchial bishop: auxiliary bishops and coadjutor bishops, who can be appointed *ex officio*, who have special powers, and who have the right of succession. The coadjutor bishop can be appointed if the eparchial bishop has health problems, is of advanced age, or suffers under another problem which impedes him in the fulfillment of his responsibilities. The initiative for the appointment can come from the eparchial bishop, the patriarch with the consent of the synod of bishops for eparchies inside the territory of the patriarchal Church, or from the Roman Pontiff for other eparchies.<sup>65</sup> The Eastern Code does not make any provision for an auxiliary with special faculties, but it does provide for the possibility of an apostolic administrator (c. 234). This office was found in the 1917 Code (cc. 312-318) but was dropped in the 1983 Code, even though apostolic administrators continue to be named for Latin dioceses.

Canon 213 deals with the rights and obligations of a coadjutor bishop as determined by his letter of appointment, by the common law, or by particular law.<sup>66</sup> The rights and obligations of a coadjutor bishop appointed by a patriarch are determined by the patriarch after consulting with the permanent council. If the coadjutor bishop is to be endowed with all the rights and obligations of an eparchial bishop, the consent of the synod is required.

Canon 214 deals with taking possession of the office of coadjutor bishop. He must show his letter to the eparchial bishop as well as to the college of eparchial consultors, in the presence of the chancellor. The coadjutor bishop must also take possession of the see when the see becomes vacant: "The coadjutor bishop acquires the right to the office at once with the vacancy, but he takes canonical possession of it only in the rite of enthronement (c. 189). He is the lawful administrator in the meanwhile (c. 222)."<sup>67</sup> These provisions are not found in the *Code of Canon Law* and might provide for a lacuna there.

Canon 215 states that the coadjutor takes the place of the eparchial bishop when he is absent or impeded. He must be appointed protosyncellus, and the eparchial bishop must commit to him those things which require a special mandate. The coadjutor bishop and the auxiliary bishop must exercise their office so that in all matters they act in unanimous agreement with him. This canon is silent on the consultation between the coadjutor bishop and the eparchial bishop, but since the coadjutor has the right of succession, the

*Code of Canons of the Eastern Churches*, New York, Saint Maron Publications, 1993, 170-175 [= POSPISHIL, *Eastern Catholic Church Law*].

<sup>65</sup> FARIS, *The Eastern Catholic Churches*, 472.

<sup>66</sup> Ibid.

<sup>67</sup> POSPISHIL, *Eastern Catholic Church Law*, 172-173.

coadjutor bishop should be involved in matters that will have an effect on the eparchy.<sup>68</sup>

Canon 216 states that the coadjutor bishop and the auxiliary bishop must perform the functions required of the eparchial bishop when he entrusts these functions to the bishops, e.g., “pontifical celebrations (e.g., the conferral of orders) or pastoral administrative responsibilities such as canonical visitations (c. 205 § 1).”<sup>69</sup> Canon 217 states that the coadjutor bishop is bound by the obligation of residing in the eparchy and is permitted to be away to fulfill some function outside the eparchy or on his one-month vacation. His presence is not mere physical presence but an active involvement in the pastoral life of the eparchy. Canon 218 deals with the resignation from office of the coadjutor bishop and the auxiliary bishop. It notes that he must present a letter of resignation at the age of seventy-five to the patriarch or to the Roman Pontiff. He can have a residence in the eparchy and is to be cared for with a suitable and dignified support. It also states that he is given the title of emeritus of the eparchy where he served as coadjutor bishop.

## 6 — *Coadjutor in the Anglican Tradition*

The Anglican Communion has no uniform polity with respect to coadjutor bishops, since there is no single, uniform canon law.<sup>70</sup> Rather, each national/regional province dictates procedures. In 2008, the Anglican Communion Office published *The Principles of Canon Law Common to the Churches of the Anglican Communion*.<sup>71</sup> This document has one reference to coadjutor bishops: “A designated ecclesiastical authority may appoint a coadjutor bishop to the diocese, with a right of succession on vacancy, in such manner and to such extent as is authorised by law.”<sup>72</sup>

This recognizes that different provinces of the Anglican Communion select bishops in different ways. In the Church of England, they are still technically appointed by the Crown, although there is an extensive local consultation process that takes place before names are provided to the Queen.

<sup>68</sup> FARIS, *The Eastern Catholic Churches*, 477.

<sup>69</sup> *Ibid.*, 478.

<sup>70</sup> This information in this section was provided by Rt. Rev. Bruce Myers OGS, Bishop of Anglican Diocese of Quebec.

<sup>71</sup> *The Principles of Canon Law Common to the Churches of the Anglican Communion*, London, The Anglican Consultative Council, 2008, at <https://www.anglicancommunion.org/media/124862/AC-Principles-of-Canon-Law.pdf> [= *Principles of Canon Law*].

<sup>72</sup> Principle 38, *Principles of Canon Law*, 48.

In other provinces, like the Church of Nigeria, bishops are elected by the House of Bishops, which consists of the existing serving bishops of that province. However, the most typical manner in which bishops are chosen is through diocesan synods, in which representative lay people and clergy cast ballots and choose from among a selection of candidates. This method has been used in Canada in some form for at least the last century; previously, the bishops were Crown appointments.

In Canada, the four regional ecclesiastical provinces (Canada, Ontario, Rupert's Land, and British Columbia & Yukon) and/or the individual dioceses have canonical jurisdiction over the election, appointment, consecration, and resignation of bishops. The *Handbook of the General Synod of The Anglican Church of Canada* defines a coadjutor bishop: "A bishop elected by a diocesan synod to assist a bishop of a diocese. A coadjutor bishop has the right of succession."<sup>73</sup> The General Synod's canons and constitution stipulate that coadjutors are voting members of the Order of Bishops when the General Synod deliberates.<sup>74</sup>

The canons of the Ecclesiastical Province of Canada have a more extensive canon on a coadjutor bishop as "a bishop who is elected or appointed to assist a diocesan bishop and who has the right to succeed the diocesan bishop when the diocesan bishop ceases to hold the office of diocesan bishop."<sup>75</sup> The process that initiates the election of a coadjutor is outlined in section 9(2): "An electoral synod shall be called to elect a coadjutor or a suffragan bishop when the diocesan bishop informs the diocesan synod that in his or her opinion the diocese requires a coadjutor bishop, or a suffragan bishop, and the diocesan synod, by resolution, concurs in the opinion of the diocesan bishop, and the Metropolitan determines that there is sufficient financial provision for the support of a coadjutor bishop, or a suffragan bishop."

Thus, the diocesan bishop decides when he wants a coadjutor, subject to the approvals indicated above. The process automatically takes place when the diocesan bishop reaches the age of sixty-nine years and six months, since the mandatory retirement age for bishops in the Anglican Church is seventy. The canons in Canada do not cover the duration of a transition between a coadjutor and a diocesan bishop, so the coadjutor could be in office for

<sup>73</sup> *Handbook of the General Synod of The Anglican Church of Canada*, Governance Manual, 19<sup>th</sup> ed., 2019, 1, at <https://www.anglican.ca/wp-content/uploads/handbook-19th-ed.pdf>.

<sup>74</sup> *Handbook of the General Synod of The Anglican Church of Canada*, Constitution, II.8.b, 12.

<sup>75</sup> ECCLESIASTICAL PROVINCE OF CANADA, Constitution, Canons and Policy Documents of the Province of Canada, Canon 3: The Election, Appointment, Consecration and Resignation of Bishops, n. 1, at <http://province-canada.anglican.org/canon-3>.

several years. However, the Episcopal Church of the United States stipulates that a diocesan bishop must retire within thirty-six months of the consecration of their successor.<sup>76</sup>

## 7 — *Summation and Reflections*

This article has reviewed developments in the law on the office of coadjutor bishop and has acknowledged a distinct evolution. These many changes give rise to some reflections on how the office of coadjutor bishop might further evolve for the good of local Churches.

### 7.1 — Summation of Legal Developments

The evolution of the canon law on the institute of the coadjutor bishop might be summarized as follows:

- a change from several kinds of coadjutor bishops to a single understanding of a coadjutor bishop;
- a change from a coadjutor bishop who may or may not have the right of succession to the teaching of Vatican II which stated that the coadjutor bishop always has the right of succession;
- a change in the context for the appointment of a coadjutor bishop, from being appointed to a diocese where the diocesan bishop was in office for life, to one where the diocesan bishop must submit his resignation at age seventy-five;
- a change in the title of coadjutor bishop, from being a titular bishop with an assigned diocese that has disappeared or was *in partibus infidelium*, to receiving the title of the see to which he will be succeeding;
- a change in the purpose of a coadjutor bishop, from being one who could stand in for an aging and incapacitated diocesan bishop who was in office for life, to a coadjutor bishop who could assist a diocesan bishop who was preparing to retire;
- a change in the origin of a coadjutor bishop, from the legal provision of being appointed *ex officio* by the Holy See, to the practice of being

<sup>76</sup> *Constitution and Canons together with The Rules of Order of the Episcopal Church*, New York, The Domestic and Foreign Missionary Society of The Episcopal Church, 2018, Article II, Sec. 1, page 4, at <https://extranet.generalconvention.org/staff/files/download/23914>.

appointed by the Holy See as a result of a request of the diocesan bishop;<sup>77</sup>

- a change in the frequency of appointment, from an exceptional appointment by the Holy See, to an appointment that could arise more frequently at the request of the diocesan bishop for the purpose of assisting in succession planning in the diocese;<sup>78</sup>
- a change in the duties of a coadjutor bishop, from having limited authority in exercising episcopal orders and having all episcopal rights and duties only when the diocesan bishop is incapacitated, to having wide authority to participate in the governance of the diocese according to his apostolic letter of appointment, the canons that permit a wider ministry, his appointment as vicar general, and his being entrusted with those matters which by law require a special mandate.

## 7.2 — Some Reflections on the Office in the Contemporary Context

With this summary, one can readily appreciate the significant changes that have occurred in the office of coadjutor bishop. As one views these changes, it becomes evident that the office of coadjutor bishop can contribute significantly to a smooth transition when a diocese becomes vacant. To consider more fully how this smooth transition may take place, one might consider a few elements associated with the appointment of a coadjutor bishop. These suggestions are supported by earlier research on the selection of bishops by Huels and Gaillardetz.<sup>79</sup> This study reviews the process of the selection of bishops in seven historical periods and concludes:

The chief values that historically have been protected by church laws and customs governing the selection of bishops are: a) the theological integrity of the local church; b) the bishop's fundamental relationship to the local church; c) participation by the representatives of the whole local church in the selection process; d) the application of the principle of subsidiarity in preserving diverse procedures for episcopal selections; e) the avoidance of interference from

<sup>77</sup> For example, the last three appointments of coadjutors in Canada (Saint-Jérôme, Halifax-Yarmouth, and Ottawa) were made as a result of a request by the diocesan bishop.

<sup>78</sup> Gordon Read reached a similar conclusion in 2010 as he described the background of the announcement that the Archbishop of Albi in France had been appointed as Coadjutor to the Archbishop of Montpellier. He concluded that appointing him as a coadjutor was to “allow a period of working together rather than a lengthy interregnum in a see of such importance” (Gordon READ, “Archbishop as Coadjutor,” in *Canon Law Society Newsletter*, 163/10, 34-35).

<sup>79</sup> See John HUELS and Richard GAILLARDETZ, “The Selection of Bishops: Recovering the Traditions,” in *Jur*, 59 (1999), 348-376.

secular authorities in the selection of bishops; f) the selection of suitable candidates for the episcopacy; g) participation by the bishops of neighboring churches in the selection of bishops; h) the expeditious provision for a vacant see.<sup>80</sup>

The authors note that Vatican II affirmed the variety of traditions regarding the selection of bishops; for *Lumen gentium*, 24 states that bishops can be designated in accord with legitimate customs, by laws made or recognized by the supreme authority, or directly by the successor of Peter.<sup>81</sup> They also note that, during the revision of the *Code of Canon Law*, members and consultants “expressed considerably different opinions on the selection of bishops, ranging from direct papal appointment of all bishops to the election of bishops in various ways by provincial or diocesan assemblies with the participation of the clergy and the people.”<sup>82</sup>

It seems that the regular selection of a coadjutor bishop, especially in large dioceses, could significantly contribute to more effective succession planning. The appointment of a coadjutor would allow him to learn the traditions and history of the local Church, meet the ordained and lay personnel of the diocese, visit and get to know the parishes, learn about the contemporary pastoral issues of the diocese, and work with the staff of the diocesan curia. He would have the opportunity of becoming fully engaged in the governance of the diocese, without having the full responsibility for that ministry. All this could take place while the diocesan bishop is present to offer further information on all these issues. This would facilitate the bishop’s relationship to the local Church that is implicit in his being the coadjutor of the local Church.

As one is aware of lengthy periods when a diocese was vacant, the appointment of a coadjutor bishop would provide for the expeditious provision for a vacant see. While this would affect the responsibilities of the college of consultants or the chapter of canons, as well as the experience of an elected diocesan administrator, the advantages of having a coadjutor bishop could certainly outweigh these usual procedures exercised during a vacant see. In the end, the appointment of a coadjutor could help the diocese in its own ecclesial self-consciousness, for he would be introduced to the gifts that are found within the diocese.

Because of the extra time available in the appointment of a coadjutor bishop, the participation by the representatives of the whole local Church in the selection process could be greatly enhanced. This could be facilitated by

<sup>80</sup> Ibid., 357.

<sup>81</sup> Ibid., 354-355.

<sup>82</sup> Ibid., 355. See also the discussion of the *Coetus studiorum de clericis*, session III, 7 December 1967, in *Comm*, 18 (1986), 94-97; session IV, 4-7 March 1968, in *Comm*, 18 (1986), 119-123, 127-128, 158-159.

the nuncio, who could be obliged to contact representatives of the clergy, members of institutes of consecrated life and societies of apostolic life, and the laity of the diocese, and prepare a report on the needs of the vacant see and the kind of episcopal leadership that would be most suitable for the particular diocese. While this may be done at present, this proposal would require a more thorough consultation with the diocese. This could certainly retrieve the conviction of the early Church whereby bishops were chosen by God whose choice could be discerned through the consent of the people, contributing to the Church's self-understanding as the "people of God." This mandatory consultation would also contribute to the principle of subsidiarity being experienced as the local Church experienced a greater role in the selection process for its new pastoral leader. Perhaps the bishops of an ecclesiastical province or of a region in a conference of bishops could have the authority, inspired by the experience of the Eastern Churches, to present to the Holy See the choice of a candidate, which could be confirmed by the Holy See.

As this proposal evolves, perhaps it will become obvious that the office of coadjutor bishop would move from being exceptional to being a regular way of preparing for the retirement of a diocesan bishop. It would provide many advantages so that a smooth transition could take place on a regular basis, especially in large dioceses. Furthermore, this proposal could include a special rite when the coadjutor takes possession of the diocese, to provide greater clarity and possibilities for diocesan gatherings.<sup>83</sup> This rite could be similar to that found in the *Code of Canons of the Eastern Churches* where the coadjutor acquires the right to the see when the see becomes vacant and exercises the authority of an apostolic administrator (*CCEO*, c. 222) until the rite of enthronement when he takes possession of the diocese (*CCEO*, c. 189).

## *Conclusion*

This article has considered the history of the office of coadjutor bishop, the provisions found prior to and in the 1917 *Code of Canon Law*, the contributions of the Second Vatican Council to this office, and the provisions of the

<sup>83</sup> Since I became diocesan bishop in the midst of a pandemic, diocesan gatherings to acknowledge my succession as archbishop had to be cancelled. However, on the day of the retirement of Archbishop Mancini, we had a short liturgical rite to acknowledge my succession as archbishop. This rite consisted of a reading of the acceptance of the resignation letter of Archbishop Mancini, an account of my appointment as coadjutor archbishop, a promise to fulfill the responsibilities connected with the governing, teaching, and sanctifying roles in the archdiocese, followed by a prayer of blessing by Archbishop Emeritus Mancini.



1983 *Code of Canon Law* and 1990 *Code of Canons of the Eastern Churches*. Significant changes were highlighted, especially in the understanding of a coadjutor bishop, with the right of succession and his rights and obligations. Recent personal experience leads me to recommend strongly that a coadjutor bishop be appointed more frequently in the transition of pastoral leadership in larger dioceses, especially for the purpose of robust succession planning.

## MINISTERIAL PUBLIC JURIDIC PERSON MODEL FOR CANONICAL GOVERNANCE

SHARON EUART

**SUMMARY** — Francis Morrissey coined the notion of the “Ministerial Public Juridic Person” to refer to a public juridic person established by a religious institute to provide a canonical structure for its apostolate. This article addresses the development of the Ministerial Public Juridic Person by religious institutes particularly in the context of the United States, by describing sponsorship, public juridic persons and the M-PJP structure, identifying the canon law governing the M-PJP, and discussing ongoing issues associated with this canonical structure for Church ministries.

**RÉSUMÉ** — Francis Morrissey a inventé la notion de «personne juridique publique ministérielle» pour désigner une personne juridique publique établie par un institut religieux pour fournir une structure canonique à son apostolat. Cet article traite du développement de la personne juridique publique ministérielle par les instituts religieux, en particulier dans le contexte des États-Unis, en décrivant le parrainage, les personnes juridiques publiques et la structure PJP-M, en identifiant le droit canonique régissant la PJP-M et en discutant des questions actuelles associées à cette structure canonique pour les ministères de l'Église.

### *Introduction*

Fr. Francis Morrissey, OMI possessed a broad knowledge of and experience in the application of canonical norms and regulations of the Catholic Church. His insights, expertise, and practical guidance for Church ministries are gifts he shared with generations of canon lawyers, ministry leaders, and Church leaders, benefiting in a special way religious institutes of women. His proficiency in the canon law governing institutes of consecrated life and societies of apostolic life, the sponsorship of ministries, and their transition to public juridic persons is a hallmark of his longtime ministry. Numerous Catholic healthcare and educational institutions sought his assistance in the

development of new structures for sponsorship to serve the needs of the ministries within a changing Church. In recent years, Fr. Morrissey became closely identified with the notion of the Ministerial Public Juridic Person (M-PJP), a structure which includes lay men and women in a new model of canonical governance. He introduced the notion to clarify the relationship of the canonical structure to the ministries they support. His efforts and his influence continue to impact the development of this evolving structure of canonical governance.

This article will address the development of the Ministerial Public Juridic Person by religious institutes,<sup>1</sup> particularly in the context of the United States, by describing sponsorship, public juridic persons and the M-PJP structure, identifying the canon law governing the M-PJP, and discussing ongoing issues associated with this canonical structure for Church ministries. I am most grateful to Fr. Morrissey for his invaluable contributions over the years, upon which I have drawn for the content of this article. It is my hope that these reflections will serve as a resource for religious institutes and other organizations considering the Ministerial Public Juridic Person as a model for canonical sponsorship of their ministries.

## 1 — *What Is Sponsorship?*

The notion of “sponsorship” in the United States had its beginning in the early twentieth century when religious institutes owned and operated their institutional ministries. It was advanced in the 1970s by religious institutes as the number of their members began to decrease and their priorities began to shift, along with Vatican II’s call to religious institutes to renew themselves by recovering and reinvigorating their founding charisms,<sup>2</sup> its recognition of the universal call to holiness,<sup>3</sup> and the important role the laity plays in the life of the Church. The process of reclaiming their traditions challenged many religious institutes to discover ways in which their present ministries addressed the needs of contemporary society. This led to revitalizing some traditional ministries, withdrawing from other traditional ministries, as well as the assignment of religious to new and expanding ministries, some of which were sponsored works of the religious institute, while others were

<sup>1</sup> The term “religious institutes” is used in this article as an umbrella term to include various types of institutes of consecrated life and societies of apostolic life described in canon law.

<sup>2</sup> VATICAN COUNCIL II, Decree on the Renewal and Adaptation of Religious Life *Perfectae caritatis*, 2.

<sup>3</sup> VATICAN COUNCIL II, Decree on the Church, *Lumen gentium*, 39.

institutionally based or parish-based ministries. External forces such as liability risks, government funding, and regulatory requirements also made it desirable to distance many of the institute's ministries from the institute itself.<sup>4</sup> In the healthcare field, these requirements led to the aggregation of healthcare institutions into systems in which the facilities remained under the ownership of the founding institutes but were governed by a single civil corporation.

Sponsorship was a way of acknowledging the important role that founding religious institutes wanted to continue to play in their ministries.<sup>5</sup> Over time, the term "sponsorship" has come to describe a complex of structural relationships between religious institutes and Church ministries. The Canon Law Society of America defined sponsorship of a ministry as "a formal relationship between a recognized Catholic organization and a legally formed entity entered into for the sake of promoting and sustaining the Church's mission in the world."<sup>6</sup> In other words, sponsorship involves a relationship to the Church.

Although there is no precise definition of sponsorship or official status in either civil or canon law, it describes an evolving concept with understandings ranging from those in which the sponsors or members of the corporation have nominal or little involvement in the oversight of the ministry to those totally controlled by the sponsors.<sup>7</sup> Relationships between sponsoring religious institutes and their sponsored ministries generally involve elements of governance, influence, and advocacy.

<sup>4</sup> See Francis MORRISEY, "Sponsorship of Catholic Health Care and Other Apostolic Works in the Church: Legal and Practical Aspects," in *StC*, 52 (2018), 509-540; for a detailed history of the origin of sponsorship, 510-514 (= MORRISEY, "Sponsorship of Catholic Health Care and Other Apostolic Works"). See also Francis MORRISEY and Sharon HOLLAND, "Ministerial Public Juridic Persons and Their Communion with the Diocesan Bishop," in *Health Progress* (November-December, 2016), 52 (= HOLLAND and MORRISEY, "Ministerial Public Juridic Person and Their Communion with the Diocesan Bishop"); Francis MORRISEY, "Various Types of Sponsorship," in R. SMITH, W. BROWN and N. REYNOLDS (eds.), *Sponsorship in the United States Context: Theory and Praxis*, Alexandria, VA, CLSA, 2006, 21 (= SMITH, BROWN and REYNOLDS [eds.], *Sponsorship in the United States Context*), (= MORRISEY, "Various Types of Sponsorship").

<sup>5</sup> See CATHOLIC HEALTH ASSOCIATION (CHA), *One Vine Different Branches: Sponsorship and Governance in Catholic Ministries*, Part II: *Practical Components of Sponsorship*, Washington DC, CHA, 2007, 12.

<sup>6</sup> SMITH, BROWN and REYNOLDS (eds.), *Sponsorship in the United States Context*, ii and 137.

<sup>7</sup> See, for example, Daniel CONLIN, "Sponsorship at the Crossroads," in *Sponsorship: Current Challenges and Future Directions in Health Progress*, St. Louis, CHA, 2001, 1-2.

## 1.1 — Evolution of Sponsorship

In the evolution of sponsorship, various forms have been tried and tested. No one form has proven to be the best or even the correct one.<sup>8</sup> A common understanding was that the religious sponsor was responsible for the actions required by canon law on behalf of the ministries. The assumption was that a canonical sponsor (religious institute) would be able to exercise its administrative responsibilities under canon law over the affairs of the civilly incorporated apostolate. Often this relationship was expressed in the form of reserved powers, considered “faith obligations,” to preserve Catholic identity and to maintain the religious institute’s control over its apostolate.<sup>9</sup> The powers usually included the right to approve the philosophy and mission of the ministry, appoint members, amend articles of incorporation, approve mergers or dissolution and, in some cases, appoint the chief executive officer.<sup>10</sup> Thus, the Catholic identity of the works could be preserved. All the while, a new partnership between religious and lay women and men was emerging.

Over the years, sponsorship has come to describe various relationships, for example, situations in which the religious institute does not have sufficient control or the ability to carry out canonical stewardship but may have something less such as nomination or appointment of board members.<sup>11</sup> This reality, in turn, has suggested that new canonical structures may be needed to parallel the realigned civil systems of past decades as well as new models to address new situations religious institutes and their ministries face today and will face tomorrow.

## 1.2 — Factors Influencing Future Sponsorship Models

Factors such as the decreasing number of women and men religious available for ministry and internal governance, mergers of religious institutes and

<sup>8</sup> Francis MORRISEY, “Our Sponsors, Yesterday, Today and Tomorrow,” in *Health Progress*, 94/4 (2013), 63 (= MORRISEY, “Our Sponsors”). See also Sharon EUART, “Religious Sponsors, Ministry Leaders and Diocesan Bishops: Together in Communion,” in *CLSAP*, 79 (2017), 110-112 (= EUART, “Religious Sponsors, Ministry Leaders and Diocesan Bishops”).

<sup>9</sup> Robert KENNEDY, “McGrath, Maida, Michiels: Introduction to a Study of the Canonical and Civil Law Status of Church-Related Institutions in the United States,” in *J*, 50 (1990), 351-401 (= KENNEDY, “McGrath, Maida, Michiels”).

<sup>10</sup> See Francis MORRISEY, “Implications of Canon Law for Catholic Health Care Leaders and Organizations,” in *Sponsor Formation Program for Catholic Health Care*, 6 March 2016, manuscript, 33. See also Amy HEREFORD, “Transitioning Sponsorship,” in *RCRI Bulletin* (Spring 2017), 10.

<sup>11</sup> CHA, *A Guide to Understanding Public Juridic Persons in the Catholic Health Ministry*, St. Louis, CHA, 2012, 54 (= CHA, *Guide to Understanding Public Juridic Persons*).

consolidation of provinces, the historical completion of some institutes, complexities in the governance of educational, healthcare and social service institutions, and recognition of the expanded ministry of the laity in partnership with religious have motivated some institutes to consider structuring the sponsorship relationship to an apostolic ministry as a separate public juridic person.<sup>12</sup> This often involves the religious institute retaining influence, but not control, over the mission of the ministry.<sup>13</sup> Within the Church, legal constructs such as public juridic persons exist not to define lines of ownership and supervision, as in civil corporate models, but rather participation and accountability for mission. Morrissey held that “sponsorship in canon law has little, if any meaning, if it is not related to the mission and ministry of the Church.”<sup>14</sup> In other words, Morrissey adds, “sponsorship today is not focused on ownership and property; rather its focus is on mission and Catholic identity.”<sup>15</sup> John Beal states that discussion of models of sponsorship, reserved powers, and mission effectiveness is “a recognition that the Catholic identity of institutional apostolates is not something given once and for all but a goal that must be maintained and fostered”<sup>16</sup> by competent leadership within and outside the institutions.

## 2 — *Catholic Identity*

Catholic identity is at the heart of sponsorship. It recognizes that Catholic institutions such as healthcare facilities, schools, universities, and social service agencies participate in the mission of Jesus: the internal faith response to Jesus Christ and the external practicalities of belonging to a visible Church with institutional structures.<sup>17</sup> Identity and mission must be similarly interrelated in

<sup>12</sup> John BEAL, “From the Heart of the Church to the Heart of the World: Ownership, Control and Catholic Identity of Institutional Apostolates in the United States,” in SMITH, BROWN and REYNOLDS (eds.), *Sponsorship in the United States Context*, 33-35 (= BEAL, “From the Heart of the Church”); Sharon HOLLAND, “Vatican Expert Unpacks Canonical PJP Process,” in *Health Progress* (September-October 2011), 53 (= HOLLAND, “Vatican Expert Unpacks Canonical PJP Process”).

<sup>13</sup> See William KING, “Sponsorship by Juridic Persons,” in SMITH, BROWN and REYNOLDS (eds.), *Sponsorship in the United States Context*, 72. (= KING, “Sponsorship by Juridic Persons”). See also MORRISSEY, “Implications of Canon Law for Catholic Health Care Leaders and Organizations,” 26.

<sup>14</sup> MORRISSEY, “Various Types of Sponsorship,” 22.

<sup>15</sup> *Ibid.*, 29.

<sup>16</sup> BEAL, “From the Heart of the Church,” 43.

<sup>17</sup> USCCB, *Application of Ex corde Ecclesiae in the United States*, Washington, DC, United States Conference of Catholic Bishops, 2000, no. 7 (= USCCB, *Application of Ex corde Ecclesiae*).

our Catholic institutions if they are to remain in the Church out of whose heart they were born.<sup>18</sup> At the same time, Catholic institutions exist also in society where culture and the gospel meet in a complex of relationships for building up the community of the Church<sup>19</sup> in the rich and diverse context of our changing times.

## 2.1 — Identifiers of Catholic Identity

Catholic identity is viewed not as a limiting requirement but rather as a life-giving connection involving the ministry leaders, sponsors, governing boards, diocesan bishops, and the entire faith community. Doris Gottemoeller, RSM offers three requirements or identifiers for Catholic identity of institutional ministries: assertion, validation, integration.<sup>20</sup> Each of these involves the ministry leader, religious sponsor, governing board, and the diocesan bishop in varying degrees and in partnership with one another.

The first identifier is *assertion* which entails publicly affirming and acknowledging the identity of the institution as Catholic by way of its name and documents, especially its mission statement. Secondly, *validation* is the process through which the Catholic identity of the ministry is authenticated or recognized by Church authority, usually by the diocesan bishop of the place where the institution/ministry is located. Validation was often quite informal, occurring generations and even centuries ago when many Catholic hospitals, colleges, and schools were founded. The recognition rested on the fact that the ministry was founded by, staffed by, and remained under the direction of a religious institute.

*Integration* is the third identifier whereby the ministry embodies in its culture and performance compatibility with Catholic Church teaching. It is in this area that the responsibilities of the sponsors and ministry leaders are most evident. The integration of Church teaching might be evident, for example, in the institution's mission statement affirming its Catholic identity; the bylaws'

<sup>18</sup> BEAL, "From the Heart of the Church," 32.

<sup>19</sup> Joseph KOMONCHAK, "The Catholic University in the Church," in J. LANGAN, SJ and L. O'DONOVAN, SJ (eds.), *Catholic Universities in Church and Society: A Dialogue on Ex corde Ecclesiae*, Washington, DC, Georgetown University, 1993, 72 (= KOMONCHAK, "The Catholic University in the Church") (= LANGAN and O'DONOVAN [eds.], *Catholic Universities in Church and Society*).

<sup>20</sup> Doris GOTTEMOELLER, "Ministry and Catholic Identity: Are they the Same?" in *Proceedings of the Symposium "Is a For-Profit Structure a Viable Alternative for Catholic Health Care Ministry?"*, Newark, NJ, Seton Hall University School of Law, 2012, 119-120 (= GOTTEMOELLER, "Ministry and Catholic Identity").

articulation of the mission and Catholic identity; orientation programs for trustees, administrators, and staff on the implications of being a Catholic institution; a strong pastoral care or campus ministry program; concern for the needs of others and compassion for the less fortunate; just treatment of employees; commitment to the spiritual care of persons serving in and served by the ministry; its service for the common good; or engagement in socially responsible investment policies.<sup>21</sup> These identifiers of Catholic identity are not mere appendages; nor is Catholic identity a list of do's and don'ts. Rather, it is essential, for it permeates the culture and character of the ministry.<sup>22</sup> Pope St. John Paul II addressed this when speaking to the Catholic academic community in 1979. "The term 'Catholic' will never be a mere label either added or dropped according to pressures of varying forces."<sup>23</sup> It enables a Catholic ministry to make a difference by contributing something important and significant to today's world. Catholic identity is complex and cannot be legislated for each ministry or institution; it is lived. It gives spirit and life to a ministry.<sup>24</sup>

## 2.2 — Catholic Identity, Communion, and Sponsorship

Catholic identity is achieved through communion with the Church. This includes an acknowledgement of the role of the bishops and the pope as leaders and teachers of the Church.<sup>25</sup> In return, bishops are to acknowledge the contributions of Catholic institutions to the Church's mission and its service of teaching, healing, and compassion. Because the bishop's role is to oversee the communion of his diocese and to keep it in communion with the universal Church, he exercises oversight of all the ministries within his diocese (c. 394 § 1). Consequently, the identity of an educational, a healthcare, or a social service ministry as "Catholic" requires that the institution be in a relationship of communion with the diocesan bishop. A ministry cannot be Catholic by itself. Catholic identity requires it to be in an ecclesial relationship beyond itself.

Sponsorship is a privileged means of building communion within the Church itself, giving rise to co-responsibility and the potential for collaboration. Reflecting on the Catholic identity of a sponsored institution or ministry,

<sup>21</sup> See USCCB, *Application of Ex corde Ecclesiae* I, 7 for additional elements of Catholic identity.

<sup>22</sup> See GOTTEMOELLER, "Ministry and Catholic Identity," 123.

<sup>23</sup> JOHN PAUL II, quoted in USCCB, *The Application of Ex corde Ecclesiae*, 8.

<sup>24</sup> Doris GOTTEMOELLER, "Preserving our Catholic Identity," in *Health Progress*, 80 (1999), 18. For a similar list of characteristics of Catholic identity, see F. MORRISEY, "What Makes an Institution Catholic?" in *J*, 47 (1987), 535-540 and IDEM, "Implications of Canon Law," 22-25.

<sup>25</sup> KOMONCHAK, "The Catholic University in the Church," 43.



perhaps questions once posed decades ago in a ministry setting have relevance today.<sup>26</sup> For example, how does the Church live within the institution or sponsored ministry? How do the Church and the sponsored ministry interact on common ground? To make it more local, what is it that makes a particular ministry Catholic? At the same time, the ministry might engage the broader education or healthcare community—its satellites, departments, and offices—to ask the question: “What do you intend to do in the coming years to uphold and strengthen the Catholic character of the ministry?”

### 3 — *Public Juridic Persons*

Given the demographic and governance realities of many religious institutes today, it is likely that over the next decade many institutes will no longer be able to carry out the responsibilities of canonical stewardship for sponsored institutions. This reality points to the need for new models of sponsorship as well as new and creative ways of ensuring the continued Catholic identity and mission of Catholic institutions. The 1983 Code of Canon Law identified new canonical structures that serve sponsorship purposes and that have been accepted either by bishops and/or the Holy See. Among these entities are public juridic persons which assume the sponsorship responsibilities previously carried out by a religious institute or a diocese.<sup>27</sup>

Apostolic works often transcend the abilities and lifespan of individual persons. To afford continuity and stability, the legal system of the Catholic Church, like other legal systems, creates artificial entities known as juridic persons on which the law confers certain rights like those of natural persons (e.g., the right to make contracts, own property, incur debts) and on which the law imposes certain obligations. Church ministries are governed by both civil and canon law, with canon law providing a structure that connects a ministry to the mission of the Church.

Public juridic persons are defined in much the same way as a non-profit civil corporation is defined in Anglo-American law. An ecclesiastical public juridic person is an aggregate of persons or things in the Church (c. 116 § 1). It is an artificial person, distinct from all natural persons who establish it, administer it, or for whose benefit it exists. It is constituted by Church

<sup>26</sup> Michael BUCKLEY, “The Catholic University and the Promise Inherent in Its Identity,” in LANGAN and O’DONOVAN (eds.), *Catholic Universities in Church and Society*, 79.

<sup>27</sup> CHA, *Guide to Understanding Public Juridic Persons*, 10.

authority or by the law itself to carry out the mission entrusted to it in the name of the Church with a capacity for continuous existence, unless it is legitimately suppressed by competent authority.

A public juridic person possesses canonical rights and duties conferred upon it either by the law itself or by the Church authority that establishes it (either a diocesan bishop or the Holy See) such as the rights to acquire property, enter into contracts, sue or be sued, and incur debts. It is represented by physical persons who are authorized to act on its behalf, either by law or by special statutes; its property is ecclesiastical property and is governed by Book V of the Code of Canon Law on temporal goods and their own statutes (c. 1257 §1). It participates in the mission of the Church and is recognized as Catholic. In turn, it must maintain communion with the Church and is subject to some degree of oversight by ecclesiastical authority.

### 3.1 — Purpose of a Public Juridic Person

The purpose of a public juridic person (c. 114 §2) is to carry out the works of the apostolate, works of piety or mercy, both spiritual and corporal in the name of the Church. Juridic personality can be conferred on a ministry if the work can serve a “genuinely useful purpose” and have the means to achieve its purpose (c. 114 §3) in view of the common good, not just that of individuals (c. 116 §1). Prior to establishing a public juridic person, Church authority must make an informed judgment about the usefulness of the apostolic work considering other works addressing the same needs in the area, and a judgment regarding the adequacy of resources available to the proposed public juridic person to achieve its purpose (c. 114 §3). Examples of public juridic person established by the law itself include a diocese, parish, seminary, conference of bishops, a religious institute and its provinces. Church institutions such as hospitals, schools, colleges, and universities can serve as the *substrata* for public juridic persons, but juridic personality is not conferred on them by the law. Rather, it can be conferred only by decree of competent Church authority.

### 3.2 — Function in the Name of the Church

An important characteristic of public juridic personality is that it functions *in the name of the Church* and not in the name of the public juridic person alone (c. 116 §1). This means that the activities of the group (e.g., the religious sponsors of Catholic educational institutions, Catholic health-care facilities, and other ministries) are the work of the Church and not

simply the work of the individuals who act on behalf of the group. Action in the name of the Church is not a private initiative of just any member of the Christian faithful. It requires that it be commissioned by someone with the authority to extend this mission to act “in the name of the Church.”<sup>28</sup> The work—education, health care, social services—which is entrusted to the religious institute, a public juridic person, is carried out in the name of the Church, in relation to the community of the Church and in communion with hierarchical leadership. Those entrusted with this task do so as responsible stewards (c. 1284 § 1) of the temporal goods entrusted to the work of the Church.

#### 4 — *Role/Relationship to the Diocesan Bishop*

Historically, women and men religious, with the blessing of local bishops, established, sponsored, and staffed most Catholic hospitals, colleges, and schools in this country. Bishops seldom were involved with the hospital, university, or school other than as an occasional commencement speaker, celebrant at a special anniversary, or to bless a new statue or buildings. Generally, both bishops and religious kept a healthy distance from each other.<sup>29</sup> With the Church’s conciliar and post-conciliar teaching, especially *Mutuae relationes*<sup>30</sup> and the revised *Code of Canon Law*, we have a renewed understanding of the local Church and the bishop’s enhanced role and responsibilities especially in the Church’s teaching on the works of the apostolate as ministries not only of the religious sponsor and the institutions, but also of the entire Church.<sup>31</sup> While the mission of

<sup>28</sup> KING, “Sponsorship by Juridic Persons,” 59-60. See also BEAL, “From the Heart of the Church,” 40.

<sup>29</sup> Joseph BERNARDIN, “Catholic Identity: Resolving Conflicting Expectations,” in Alphonse P. SPILLY (ed.), *Selected Works of Joseph Cardinal Bernardin*, vol. 2: *Church and Society*, Collegeville, MN, Liturgical Press, 1991, 171. Also printed in *Origins*, 21/2 (1991), 33-36 (= BERNARDIN, “Catholic Identity”).

<sup>30</sup> CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE and CONGREGATION FOR BISHOPS, *Directives for the Mutual Relations between Bishops and Religious in the Church*, at [https://www.vatican.va/roman\\_curia/congregations/ccsclife/documents/rc\\_con\\_ccsclife\\_doc\\_14051978\\_mutuae-relationes\\_en.html](https://www.vatican.va/roman_curia/congregations/ccsclife/documents/rc_con_ccsclife_doc_14051978_mutuae-relationes_en.html)

<sup>31</sup> Joseph TOBIN, “The Charism and Goods of an Institute and Their Relationship to the Local Church,” in *The Management of the Ecclesiastical Goods of Institutes of Consecrated Life and Societies of Apostolic Life: At the Service of humanum and the Mission of the Church; Proceedings of the International Symposium, 8-9 March 2014*, Rome, Libreria Editrice Vaticana, 2014, 58.

consecrated life is universal, it is incarnated in the local Church.<sup>32</sup> Observing the appropriate autonomy of canon 586 § 2, religious should engage in prior consultation with the diocesan bishop before closure or restructuring of apostolic works. Pope Francis speaks of the “co-essentiality of hierarchical and charismatic gifts” (*LG* 4) as flowing from the Spirit and nourishing the Church’s life and missionary activity.”<sup>33</sup> The challenge today is to know how best to work together in a spirit of mutuality and harmony in promoting the experience of communion.

As sponsorship of our Catholic institutions by religious institutes takes on new forms, issues related to the changing reality of the ministry invite the sponsors, governing boards, ministry leaders, and the bishop of the diocese to share insights and experience in a spirit of mutual trust and dialogue around practical yet important issues facing Catholic institutions.<sup>34</sup> For example, as the number of religious in governance decreases, what new structures for sponsorship is the religious institute(s) considering? What are the implications of a new sponsorship structure? Are there periodic conversations between the sponsor of a Catholic institution and the diocesan bishop? Is the diocesan bishop welcomed in sponsored institutions? How can bishops better serve sponsored ministries? How can sponsored ministries better serve the local Church?<sup>35</sup>

A relationship of trust requires openness to mutually respectful dialogue, which Pope St. Paul VI calls “a form of spiritual communication.”<sup>36</sup> In the encyclical *Ecclesiam suam*, Paul VI refers to dialogue as a “method of accomplishing apostolic mission” characterized by clarity of language, meekness in communicating the truth, trust in the power of one’s words and the integrity of others, and prudence in being attuned to the sensitivities of others (*ES* 81). If sponsorship is intimately related to mission, dialogue is a constituent element of sponsorship.

<sup>32</sup> CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE (CICLSAL), *Economy and the Service of Charism and Mission*, Rome, Libreria Editrice Vaticana, 2018, no. 29 (= CICLSAL, *Economy and the Service of Charism and Mission*).

<sup>33</sup> FRANCIS, Address to the Participants at the International Congress for Episcopal Vicars and Delegates for Consecrated Life, Rome, 28 October 2016, no. 1 at [https://www.vatican.va/content/francesco/en/speeches/2016/october/documents/papa-francesco\\_20161028\\_vita-con-sacrata-convegno.html](https://www.vatican.va/content/francesco/en/speeches/2016/october/documents/papa-francesco_20161028_vita-con-sacrata-convegno.html)

<sup>34</sup> See EUART, “Religious Sponsors, Ministry Leaders and Diocesan Bishops,” 117-118.

<sup>35</sup> See ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES (AJCU), *Some Characteristics of Jesuit Colleges and Universities: A Self-Evaluation Instrument*, Washington, DC, AJCU, 2012, 18. See also BERNARDIN, “Catholic Identity,” 174.

<sup>36</sup> PAUL VI, encyclical *Ecclesiam suam*, 6 August 1964, in AAS, 56 (1964), 606-659, no. 81.

## 5 — Ministerial Public Juridic Persons

In recent years, particularly in Catholic health care and increasingly in education, public juridic persons that connect a ministry to the Church are often referred to as ministerial public juridic persons (M-PJPs) to distinguish them from other public juridic persons such as religious institutes which often bring together ministries to make up a ministerial public juridic person.<sup>37</sup> While this title may better describe the theological reality of ministry, it is a category of public juridic personality that is not recognized in canon law. M-PJPs remain canonically public juridic persons. The sponsorship relationship maintains the connection between the founding institute and the ministry. It also connects the M-PJP to the governance structure of the Church either through the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL) for pontifical institutes or the diocesan bishop for diocesan institutes in a more visible relationship.<sup>38</sup>

Ministerial public juridic persons are structured in such a way that the reserved powers pass into the hands of appointed members (religious and/or lay persons) of the governing body, rather than to those of religious superiors and councils. Such powers might include changes in mission, philosophy, or direction of the institution; approval for alienation of property; number of representatives of the founding sponsoring institute on the governing body; oversight for leadership formation; approval of the chief executive officer of the ministry; approval of trustees or representation on a nominating committee or search committee; and annual reports.<sup>39</sup> These powers are defined in the canonical statutes and the civil articles of incorporation.

<sup>37</sup> See, for example, publications of the CATHOLIC HEALTH ASSOCIATION, *Guide to Understanding Public Juridic Persons; Temporal Goods at the Service of the Mission of Ministerial Public Juridic Persons*, St. Louis, CHA, 2017; *Core Competencies of Sponsor*, St. Louis, CHA, 2017; Sharon EUART, "Ministerial Public Juridic Person: What Is It? What Are the Canonical Implications?" Part I, in *RCRI Bulletin*, 22 (Winter 2019), 18-25; and Mark CHOPKO, "Ministerial Public Juridic Persons – Civil Law Issues," Part II, in *RCRI Bulletin*, 22 (Winter 2019), 26-30.

<sup>38</sup> See Mary WRIGHT, "The Development of Ministerial Public Juridic Persons: Questions and Challenges," in *CLSANZP*, 52 (2018), 16, at <https://ampjp.org.au/wp-content/uploads/2020/07/CLSANZ-Proceedings-2018-Development-of-Ministerial-PJPs.pdf>

<sup>39</sup> See Patricia DUGAN, "The Sponsorship Relationship: Incorporation and Dissolution, Civil and Canon Law Perspectives," in SMITH, BROWN and REYNOLDS (eds.), *Sponsorship in the United States Context*, 76 (= DUGAN, "The Sponsorship Relationship"); MORRISEY, "Sponsorship of Catholic Health Care and Other Apostolic Works," 535.

## 5.1 — Petitioning for a M-PJP

When the religious sponsors of Church ministries are studying how best to structure their ministries for the future, the M-PJP is often one model that sponsors study. Among the issues to be considered are the canonical status best suited for the ministries, ownership of temporal goods, and civil incorporation.

### 5.1.1 — *Diocesan or pontifical institute*

The canonical status of the M-PJP as diocesan or pontifical is an important element to be considered. If the ministry has been historically sponsored by a pontifical religious institute, the transition of the ministry to a new pontifical M-PJP would be consistent with its history. Similarly, if the founding religious institute is a diocesan right institute, the ministry would become a new diocesan M-PJP.

Another factor in determining the status of the M-PJP can be the geographic location of the ministry. If the ministry takes place in more than one diocese (e.g., schools of a charism group such as Dominican high schools, a Catholic health system with multiple sites in multiple dioceses, all educational or healthcare ministries of a single religious institute spread throughout a country, or a grouping of multiple ministries), it is more appropriate to relate directly to the Holy See than to multiple diocesan bishops. If the petition to the Holy See is for ministries of a pontifical religious institute carried out in a single diocese, the Holy See may determine that the new entity become a diocesan M-PJP rather than a pontifical one.

### 5.1.2 — *Temporal goods*

When a religious institute is considering petitioning for the establishment of a ministerial public juridic person, it is important to address issues related to temporal goods, though this can be a complex task. Canon 1255 affirms the capacity for ownership of temporal goods by public juridic persons. Civil law recognition of ownership is necessary through incorporation or other civil law structuring of Church-related institutions. Canon 1257 describes the temporal goods of public juridic persons as “ecclesiastical goods” and explicitly states that they are subject to the norms of Book V of the *Code of Canon Law* and the statutes governing the public juridic person to which the goods belong.

Civil incorporation of educational or charitable institutions has no canonical effect on the institution’s previously acquired canonical status.<sup>40</sup> In many

<sup>40</sup> KENNEDY, “McGrath, Maida, Michiels,” 370.

instances, these institutions belonged to the sponsoring religious institute as the apostolic work of a public juridic person in the Church. In situations where the deed to land and buildings used by the separately incorporated institution is kept in the name of the founding religious institute, the canonical status is less complicated. The canonical status of the separately incorporated institution remains an apostolic work of the institute which retains ownership of the real estate.<sup>41</sup>

In situations where the title to the land and buildings is transferred to the separately incorporated institution, the canonical status of the institution may be ambiguous. It may be intended as simply putting title to the property “in the name of” a separate civil corporation to ensure civil-law separateness with insulation from civil law liability with no intention to transfer ownership or alter the canonical status of the institution or property as belonging to the sponsoring religious institute. If, however, the intention is truly to transfer the ownership of the property, either as gift or sale, and to change the canonical status of institution, the norms for the alienation of ecclesiastical property must be followed.<sup>42</sup> It is important to distinguish between property belonging directly to the juridic person and that which is entrusted to another entity for a specific purpose.<sup>43</sup>

In more recent years, some educational or charitable institutions were established at inception as a civil corporation with all its assets from benefactors, donors, and capital campaigns conveyed directly to the civil corporation rather than to the sponsoring religious institute. In these cases, none of the property of the separately incorporated institution was ever, canonically or civilly, the property of the sponsoring religious institute. It may also be the case where parcels of the property of separately incorporated institutions remain part of the apostolic work of the sponsoring institute and are considered ecclesiastical property whereas new construction and expanded facilities are assets built from money from governmental or private donors, campaigns intended for the institution and not for the sponsoring religious institute.<sup>44</sup> The canonical norms for alienation would have to be followed for a transfer of ownership of those portions of the property belonging to the religious institute.

Generally, the establishment of a M-PJP will involve the canonical alienation of Church property, though perhaps not all the property related to the ministry. The religious institute should determine which properties are to be

<sup>41</sup> Ibid., 371.

<sup>42</sup> Ibid., 371, 373.

<sup>43</sup> MORRISEY, “Sponsorship of Catholic Health Care and Other Apostolic Works,” 528.

<sup>44</sup> KENNEDY, “McGrath, Maida, Michiels,” 370-377; see also BEAL, “From the Heart of the Church,” 38.

alienated and which are not. The alienation does not have to occur at one time but can be a gradual transfer of ownership. If the petition for a M-PJP includes alienation of property, the decree of erection establishing the new M-PJP usually includes permission to alienate.

### 5.1.3 — *Civil documents*

It is important that the civil documents reflect the requirements of the canonical statutes. For example, sponsors of the M-PJP and the sponsored institutions should ensure that the essential characteristics of Catholic identity are clearly and precisely incorporated in the legal documents of the civil corporation.<sup>45</sup> Canonical control must be clearly demonstrated in at least some of the reserved powers if sponsorship is to be considered canonical ownership.<sup>46</sup>

## 5.2 — Questions for Reflection and Discernment

In discussions and reflection regarding the M-PJP model of sponsorship, sponsors and ministry leaders might address questions such as the following.

- What is the motivation to consider a new canonical relationship with a ministry?
- How does the religious institute sustain the institute’s charism and the founder’s vision and values amid change?
- How can the institute be sure this model will continue to meet the needs of students, patients, clients, etc. in the future?
- How does the institute not lose its identity in the change?
- How does the institute attend to its members whose lives have been invested in the schools, colleges, universities, healthcare facilities, or other entities?
- How does the institute cope with major changes—loss of sponsorship and ministries?

These issues and their responses are critical to the discernment process and help to inform the shape of the structure and its canonical statutes. Pope Francis, in addressing the sustainability of apostolic works, recalled that “to be faithful commits us to an assiduous work of discernment, so that the works, consistent with the charisms, continue to be effective

<sup>45</sup> DUGAN, “The Sponsorship Relationship,” 77.

<sup>46</sup> MORRISEY, “Sponsorship of Catholic Health Care and Other Apostolic Works,” 535.



instruments to make God's tenderness reach many."<sup>47</sup> What is clear is that the M-PJP model must have as a foundation a common vision and mission and core values.

### 5.3 — Implications for the Sponsor(s) and Ministry

With the establishment of a M-PJP, there are several implications for the sponsoring religious institute(s) and the ministry. In addition to the implications listed below, each situation may have additional ones.

- The purpose for the M-PJP for a Catholic school, college, or healthcare facility is in keeping with the teaching and healing mission of the Church. Foremost, it ensures the continuity of the institution as a Catholic ministry in the tradition and charism of the founding religious institute(s).
- The relationship between the Catholic ministry and the religious institute is changed with the establishment of the institution as a M-PJP. The effect is that the canonical sponsorship of the institution is transferred from the religious institute to the new entity, that is, to the M-PJP. The religious institute is no longer the canonical sponsor.
- This change does not mean that the religious will not be involved in the governance of the M-PJP. The canonical statutes may provide for a number or percentage of the members of the governing body to be members of the sponsoring religious institute(s) for as long as it is possible.
- As a public juridic person in the Church, the property of the religious institute is ecclesiastical property subject to the norms of Book V of the *Code of Canon Law*. When a M-PJP is established, the decree of establishment often includes the transfer of ecclesiastical ownership of the property (usually exercised through reserved powers) from the sponsoring religious institute to the new canonical entity. The new M-PJP then exercises any reserved powers over the civil corporation.
- The sponsorship oversight for the institution benefits from women and men, both vowed religious and lay, who are experienced and knowledgeable of the Catholic Church and the Catholic ministry.<sup>48</sup>

<sup>47</sup> FRANCIS, Message to the Participants at the Second International Symposium on the Theme "Re-thinking the Economy of Institutes of Consecrated Life and Societies of Apostolic Life in Fidelity to the Charism," Rome, 25 November 2016, quoted in CICLSAL, *Economy and the Service of Charism and Mission*, no. 34.

<sup>48</sup> ELIAS AYUBAN, "Ministerial Public Juridic Persons: Blessings and Challenges," in *Commentarium pro religiosis et missionis*, 95 (2014), 70.

- The M-PJP allows for greater stability in the oversight of the institution. For example, changes in sponsorship agreements, procedures, and processes that might occur with changes in canonical leadership of the sponsoring institute are no longer necessary.
- While the relationship of the diocesan bishop to the ministry does not change, the person he contacts with questions or concerns does change. Rather than dealing directly with a provincial or superior general of the religious institute, he relates to the chairperson of the governing body of the M-PJP who may be a religious or a lay person.<sup>49</sup>
- Leadership formation for members of the governing body as well as for members of the institution's board of trustees is an important aspect of the new M-PJP in which the sponsoring institute plays a vital role. The leadership formation program provides a deeper awareness of the spirit of the institution and its religious heritage, distinguishing mission and ministry from business, Catholic social teaching, administration of ecclesiastical goods, and understanding what it means to "function in the name of the Church."<sup>50</sup>

## **6 — *M-PJPs and the Future***

The process for petitioning the Apostolic See for approval of a ministry as a M-PJP is a complicated and comprehensive one. Examples in the USA can be found most often in the field of health care, and usually involve several religious institutes coming together to form a Catholic healthcare system with multiple facilities. While there are few M-PJPs for Catholic education in the USA, today there is the beginning of significant discussions among religious sponsors and educational leaders regarding this option as a possibility for future structures of canonical governance. In addition, an increasing number of religious institutes are considering the M-PJP as a structure for multiple ministries, combining healthcare facilities, educational institutions, retreat centers, and social service agencies into a single M-PJP. As religious institutes continue to plan for their future and the future of their apostolates, the M-PJP is a model that presents the opportunity for the founding religious institute and/or others to ensure the continuity of their ministry's Catholic identity, mission, and charism. The experience of recent decades, however,

<sup>49</sup> MORRISEY and HOLLAND, "Ministerial Public Juridic Person and their Communion with the Diocesan Bishop," 58.

<sup>50</sup> See HOLLAND, "Vatican Expert Unpacks Canonical PJP Process," 59.

has shown that there are several ongoing canonical issues related to the growth of M-PJPs that could benefit from further research, study, and development. The following are some issues and proposals.

### **6.1 — Sponsorship Relationship**

According to the data collected by the National Religious Retirement office, the global pattern of demographic change in institutes of women and men religious in the United States has been one of significant decline.<sup>51</sup> With a rising median age and a small number of new members, fewer religious are available to serve in governance roles in the institute itself as well as its sponsored ministries. Greater clarification regarding the expectations of a sponsorship relationship and its meaning in each ministry or institution can lead to fruitful dialogue, collaboration, and informed decisions for the good of the ministry.

### **6.2 — Criteria for Approval of M-PJPs**

A religious institute interested in considering a M-PJP for its ministries often is not aware of what questions to ask before beginning a discernment process. Leaders will often consult a canon lawyer about the process and the criteria for establishment of a M-PJP by CICLSAL. While CICLSAL has developed an informal listing of canonical requirements for the petition, the materials are not easily available and, at times, are interpreted differently by different officials of the dicastery. The situation could be remedied by the publication on its website of the relevant requirements and procedures regarding a petition for a M-PJP. An official publication by the Holy See would make the requirements better known and more easily available to religious leaders and their canonical advisors.

### **6.3 — Competency for Approval of M-PJPs**

Since the first public juridic person for healthcare ministries in the USA was approved in 1991 by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, other pontifical religious institutes have submitted petitions for M-PJPs to CICLSAL for approval. With the development

<sup>51</sup> See NRRO, “Age Distribution of Religious,” at <https://www.usccb.org/offices/national-religious-retirement-office/statistics> 4. See also Stephanie STILL, “Canonical Governance Options and Possibilities for Collaboration,” in *RCRI Bulletin*, 24 (Winter 2020-2021), 4.

of lay leadership in Catholic health care and educational ministries and the appointment of competent lay men and women to serve in leadership roles on the governing bodies of M-PJPs now or in the future when religious are no longer available to serve in governance roles, the question arises regarding which dicastery or office in the Roman Curia is the most appropriate locus of competence for approval and oversight of pontifical M-PJPs. A response to this question is urgent if the Catholic identity of some Catholic educational and healthcare institutions, currently sponsored by religious institutes, are to retain their Catholic identity and relationship to the Church, given the decreasing presence of religious in governance and the increasing number of lay women and men formed to assume leadership roles in these institutions.

#### **6.4 — Proposal for an Expanded Review Perspective**

As the complexity of Catholic health care and Catholic education continues to raise issues in both canon and civil law, new challenges arise for those charged with reviewing canonical statutes (and civil statutes) for M-PJPs. CICLSAL might consider identifying canon and civil lawyers to serve as consultants or *periti* in the review of M-PJP petitions and accompanying documentation submitted for approval by the dicastery. At least one of the consultants should have knowledge of the country where the M-PJP is to be established. The review would include an evaluation of the canonical and civil documents in light of the published canonical norms as well as the civil law requirements of the respective country. The findings would be communicated in a written report to the dicastery.

#### **6.5 — Proposal for an Integrated Authority Structure**

In the light of the predictable increase in petitions for pontifical M-PJPs, as well as the continued decline in the presence of women and men religious in governing roles and limitations of staff time and proficiency in CICLSAL for the approval of petitions, an alternative process for approval should be considered by CICLSAL. CICLSAL would propose that the appropriate authority in the Holy See establish an Inter-Dicasterial Commission for the review, approval, and oversight of M-PJPs. The Commission would be composed of representatives from the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, Congregation for Catholic Education, Congregation for Bishops, Dicastery on the Laity, Dicastery for Promoting Integral Human Development, and include canon and civil lawyers from the

countries where the M-PJPs are to be established. This integrated approach would provide a broader perspective for the review, approval, and oversight process for the M-PJPs. Such an approach also would provide for the annual review on the activities reported by the M-PJPs and facilitate communication between the M-PJPs and diocesan bishops.

## 6.6 — Formation Programs for Lay Leaders

The importance of ongoing formation for the future of M-PJPs cannot be overstated and poses a major challenge for members of the governing body, especially for future generations of leaders. A significant requirement in the petition for a M-PJP is the development of a formation plan for members of the governing body and for the trustees of the member institutions. The challenge is to identify how best to form lay leaders, who already possess professional expertise and a commitment to the mission of the Church, to serve together with other lay, religious, and Church leaders in ways that will ensure the Catholic identity of the M-PJP in the spirit of the charisms of the sponsoring institutes. This formation must respect the evolving charism of the M-PJP in an ongoing dialogue with Church representatives in the USA and in the Holy See. The formation of lay sponsors and board leadership plays a critical role in the future of the Catholic healthcare and education apostolates.

Over the years, the M-PJPs and other organizations have provided programs to ensure in-depth doctrinal and pastoral formation for members of the M-PJP governing body as well as for those who were in leadership roles in the various systems.<sup>52</sup> The results have been very positive, although there remains more to do to ensure that the increasing number of qualified lay leaders will continue to assume responsibility not only for leadership roles in the M-PJP, while helping them to relate effectively with Church authorities and their representatives, in a spirit of mutuality, harmony, and fidelity to mission.

## *Conclusion*

At a time when many religious institutes can no longer manage their ministries independently, the model of the M-PJP for sponsoring Catholic ministries is an option for canonical governance that recognizes a future for apostolic works founded by religious institutes. The Church's ministries in

<sup>52</sup> MORRISEY and HOLLAND, "Ministerial Public Juridic Persons and Their Communion with the Diocesan Bishop."

health care, education, and social service are being progressively transformed by contemporary realities, both inside the Church and beyond. Alternative ways of exercising an apostolate, once primarily the domain of religious institutes, are being developed and implemented. This metamorphosis calls for new structures that are anchored in the commitment of sponsors and ministry leaders in order to promote and enhance the institutions' mission, Catholic identity, and communion with the Church. The task is not easy, but it is worth the effort. Many religious institutes have or will establish M-PJPs under the enduring guidance of Fr. Morrissey's contributions. They have begun to chart a way to carry forward the mission of Christ that will continue to unfold for generations to come in the religious traditions that began decades, even centuries ago, in the United States. In conclusion, the following words express Fr. Morrissey's profound hope that leads us.

*"The engagement of lay women and men in M-PJP sponsorship roles in Catholic education, health care and social services is profound evidence of the Spirit's involvement in our contemporary Church life and ministry. This changed face of sponsorship represents not a loss but an ongoing evolution and dynamic gift to the Church."*<sup>53</sup>

<sup>53</sup> CHA (unsigned article), "Ministerial Juridic Person: The Growing Role for Laity in Canonical Sponsorship of Catholic Health Care," in *Health Progress* (September-October 2014) at <https://www.chausa.org/publications/health-progress/article/september-october-2014/ministerial-juridic-person-the-growing-role-for-laity-in-canonical-sponsorship-of-catholic-health-care>

## MINISTERS OF DIVINE JUSTICE AND MERCY. JURIDICAL CONSIDERATIONS ON THE ROLE OF CONFESSORS AND THE SACRAMENT OF PENANCE

CHAD J. GLENDINNING

**SUMMARY** — The Code of Canon Law refers to a confessor as a “minister of divine justice and mercy” (c. 978). This study examines various juridical and pastoral issues associated with the celebration of the Sacrament of Penance, particularly concerning the role of confessors. The study begins with an examination of the concepts of “justice” and “mercy” and how they interrelate, before proceeding to address various juridical aspects of the confessor’s ministry. Topics include: (1) the availability of the sacrament; (2) the manner of questioning the penitent; (3) the ability to discern the disposition of the penitent and withholding absolution; and (4) the imposition of appropriate penances. While largely juridical, the study draws heavily on developments during Pope Francis’ pontificate concerning the fruitful celebration of the sacrament of penance and the ministry of confessors.

**RÉSUMÉ** — Le Code de droit canonique fait référence au confesseur comme à un “ministre de la justice et de la miséricorde divine” (c. 978). Cette étude examine diverses questions juridiques et pastorales liées à la célébration du sacrement de pénitence, en particulier concernant le rôle des confesseurs. L’étude commence par un examen des concepts de “justice” et de “miséricorde” et de leur interrelation, avant d’aborder divers aspects juridiques du ministère du confesseur. Les sujets abordés comprennent : (1) la disponibilité du sacrement ; (2) la manière d’interroger le pénitent ; (3) la capacité de discerner la disposition du pénitent et de refuser l’absolution ; et (4) l’imposition de pénitences appropriées. Bien qu’essentiellement juridique, l’étude s’appuie largement sur les développements du pontificat du pape François concernant la célébration fructueuse du sacrement de pénitence et le ministère des confesseurs.

## *Introduction*<sup>1</sup>

In February 2008, the Center for Applied Research in the Apostolate (CARA) at Georgetown University surveyed 1,007 self-identified adult Catholics in the United States on their participation and belief in the sacraments.<sup>2</sup> Among other things, respondents were asked how frequently they participate in the Sacrament of Reconciliation. The report indicates that “[t]hree-quarters of Catholics report that they never participate in the sacrament of Reconciliation or that they do so less than once a year.” Only two percent of respondents approach the sacrament once a month or more. The numbers improve among those who identify as weekly church attenders: “More than six in ten weekly Mass attenders (62 percent) say they participate in Reconciliation at least once a year, compared to 37 percent of those attending Mass less than weekly but at least once a month and only 6 percent of those attending less often.” Only six percent of weekly church attenders approach the Sacrament of Reconciliation once a month or more. These numbers are stark, and similar trends regarding religious practice and affiliation are noted in Canada.<sup>3</sup>

The notable decline in participation provides the proximate context in which to situate the repeated invitation to rediscover the importance of the Sacrament of Penance extended during the pontificates of John Paul II and Benedict XVI.<sup>4</sup> Following the sixth general assembly of the Synod of Bishops,

<sup>1</sup> This study is derived, in part, from a presentation given to the annual convention of the Canadian Canon Law Society, 24-27 October 2016, in Vancouver, BC.

<sup>2</sup> The full report can be found here: <http://cara.georgetown.edu/sacramentsreport.pdf>. Similar trends are noted in a 2015 survey by the Pew Research Center: <https://www.pewresearch.org/wp-content/uploads/sites/7/2015/09/Catholics-and-Family-Life-09-01-2015.pdf>. The study notes: “About four-in-ten Catholics (43%) say they go to confession at least once a year, including 7% who report going monthly and 14% who say they go several times a year. Those who attend Mass at least once a week are far more likely than less-frequent church attenders to say they go to confession once a year or more (68% vs. 27%). But, on the whole, there are only modest differences on this question among women and men, younger and older Catholics, whites and Hispanics, and college graduates and those with less education” (ibid., p. 20).

<sup>3</sup> See PEW RESEARCH CENTER, “Canada’s Changing Religious Landscape,” 27 June 2013, <https://www.pewforum.org/2013/06/27/canadas-changing-religious-landscape/>; Colin LINDSAY, “Canadians Attend Weekly Religious Services Less than 20 Years Ago,” June 2008, <https://www150.statcan.gc.ca/n1/en/pub/89-630-x/2008001/article/10650-eng.pdf>.

<sup>4</sup> The *Catechism of the Catholic Church* notes that the sacrament is known by a variety of names: the “sacrament of conversion,” the “sacrament of penance” (CCC, n. 1423), the “sacrament of confession,” the “sacrament of forgiveness,” and the “sacrament of reconciliation” (CCC, n. 1424). The “sacrament of penance” will be used throughout this study, since it is the term used in the *Code of Canon Law* (cc. 959-997) and in the rite itself (*Ordo paenitentiae*). *Catechismus Ecclesiae Catholicae*, Vatican City, Libreria Editrice Vaticana, 1997; *Catechism of the Catholic Church*, Ottawa, Canadian Conference of Catholic Bishops, 2000 (= CCC).



on the theme of penance and reconciliation in the life of the Church, John Paul II issued the post-synodal apostolic exhortation *Reconciliatio et paenitentia*. This text provides a comprehensive framework for understanding the importance of reconciliation and the various elements that make up the celebration of the sacrament.<sup>5</sup> Recognizing the “crisis” that was occurring at the close of the Jubilee Year in 2001, John Paul II, by means of his apostolic letter *Novo millennio ineunte*, called for “renewed pastoral courage in ensuring that the day-to-day teaching of Christian communities persuasively and effectively presents the practice of the Sacrament of Reconciliation” (n. 37).<sup>6</sup> Likewise, by means of the 2002 motu proprio *Misericordia Dei*, John Paul II encouraged bishops to undertake a “rigorous revitalization” of the sacrament and provided additional norms to prevent a proliferation of the use of general absolution outside the circumstances foreseen in the law.<sup>7</sup>

Benedict XVI, by means of his post-synodal apostolic exhortation *Sacramentum caritatis*, following the eleventh ordinary general assembly of the Synod of Bishops in 2005, recalled that bishops have “the pastoral duty of promoting within their Dioceses a reinvigorated catechesis on the conversion born of the Eucharist, and of encouraging frequent confession among the faithful.” As such, “[a]ll priests should dedicate themselves with generosity, commitment and competency to administering the sacrament of Reconciliation” (n. 21).<sup>8</sup>

In 2012, the thirteenth ordinary general assembly of the Synod of Bishops met to discuss the “new evangelization.” At its close, the synodal assembly adopted several propositions, one of which was dedicated to the sacrament of reconciliation, insisting that the sacrament occupy a central place in the pastoral activity of the Church:

Proposition 33: THE SACRAMENT OF PENANCE AND THE NEW EVANGELIZATION

The Sacrament of Penance and Reconciliation is the privileged place to receive God’s mercy and forgiveness. It is a place for both personal and

<sup>5</sup> JOHN PAUL II, Post-Synodal Apostolic Exhortation on Reconciliation and Penance in the Mission of the Church Today *Reconciliatio et paenitentia*, 2 December 1984, in AAS, 77 (1985), 185-275, English translation in *Origins*, 14 (1984-1985), 432-458 (= JOHN PAUL II, *Reconciliatio et paenitentia*).

<sup>6</sup> JOHN PAUL II, Apostolic letter at the Close of the Great Jubilee of the Year 2000, *Novo millennio ineunte*, 6 January 2001, n. 37, in AAS, 93 (2001), 292, English translation in *Origins*, 30 (2000-2001), 501.

<sup>7</sup> JOHN PAUL II, Apostolic Letter *motu proprio* on the Sacrament of Penance *Misericordia Dei*, 7 April 2002, in AAS, 94 (2002), 453, English translation in *Origins*, 32 (2002-2003), 14.

<sup>8</sup> BENEDICT XVI, Post-Synodal Apostolic Exhortation on the Eucharist as the Source and Summit of the Church’s Life and Mission *Sacramentum caritatis*, 22 February 2007, in AAS, 99 (2007), 121, English translation in *Origins*, 36 (2006-2007), 636.

communal healing. In this sacrament, all the baptized have a new and personal encounter with Jesus Christ, as well as a new encounter with the Church, facilitating a full reconciliation through the forgiveness of sins. Here the penitent encounters Jesus, and at the same time he or she experiences a deeper appreciation of himself and herself. The Synod Fathers ask that this sacrament be put again at the center of the pastoral activity of the Church.

In every diocese, at least one place should be especially dedicated in a permanent way for the celebration of this sacrament, where priests are always present, allowing God's mercy to be experienced by all the faithful. The sacrament should be especially available, even on a daily basis, at places of pilgrimage and specially designated churches. Fidelity to the specific norms which rule the administration of this sacrament is necessary. Every priest should consider the Sacrament of Penance an essential part of his ministry and of the New Evangelization, and in every parish community a suitable time should be set apart for hearing confessions.<sup>9</sup>

The Jubilee Year of Mercy, inaugurated in 2015-2016 by Pope Francis, likewise provided an appropriate occasion to reflect on the Sacrament of Penance and the role of confessors. In the Bull of Indiction, *Misericordiae vultus*, Francis called for a rediscovery of the Sacrament of Penance in the lives of the Christian faithful. "Let us place the Sacrament of Reconciliation at the centre once more in such a way that it will enable people to touch the grandeur of God's mercy with their own hands. For every penitent, it will be a source of true interior peace."<sup>10</sup>

This rediscovery of the Sacrament of Penance can only be achieved through the availability and cooperation of parish priests. Indeed, John Paul II, in *Novo millennio ineunte*, encouraged pastors to "arm themselves with more confidence, creativity and perseverance in presenting it and leading people to appreciate it" (n. 37). This study aims to assist in this task by examining various juridical and pastoral issues associated with the celebration of the Sacrament of Penance, particularly concerning the role of confessors. The Code of Canon Law speaks of a confessor as a "minister of divine justice and mercy" (c. 978). Frequently, these terms are juxtaposed, as if one excludes the other. The study begins with an examination of the concepts

<sup>9</sup> SYNOD OF BISHOPS, Final List of Propositions, XIII Ordinary General Assembly, 27 October 2012, [http://www.vatican.va/news\\_services/press/sinodo/documents/bollettino\\_25\\_xiii-ordinaria-2012/02\\_inglese/b33\\_02.html](http://www.vatican.va/news_services/press/sinodo/documents/bollettino_25_xiii-ordinaria-2012/02_inglese/b33_02.html).

<sup>10</sup> FRANCIS, Bull of Indiction of the Extraordinary Jubilee of Mercy *Misericordiae vultus*, 11 April 2015, n. 17, in AAS, 107 (2015), 412, English translation in *Origins*, 44 (2014-2015), 752 (= FRANCIS, *Misericordiae vultus*). This Holy Year was inaugurated on the Solemnity of the Immaculate Conception (8 December 2015) and concluded on the Solemnity of Christ the King (20 November 2016).

of “justice” and “mercy” and how they interrelate, before proceeding to address various juridical aspects of the confessor’s ministry. Topics to be considered include: (1) the availability of the sacrament; (2) the manner of questioning the penitent; (3) the ability to discern the disposition of the penitent and withholding absolution; and (4) the imposition of appropriate penances. While this study is largely juridical, based on the law and magisterial teaching of the Church, it will draw heavily on Francis’ remarks and developments during his pontificate, concerning the fruitful celebration of the sacrament of penance and the ministry of confessors—the “authentic signs of the Father’s mercy.”<sup>11</sup>

## 1 — *Justice and Mercy*

Justice is a cardinal virtue, one of the four principal natural virtues, along with prudence, fortitude, and temperance.<sup>12</sup> Specifically, justice is “a habitual and firm disposition to do the good” (CCC, n. 1803). The *Catechism of the Catholic Church* indicates: “Justice is the moral virtue that consists in the constant and firm will to give their due to God and neighbor. [...] Justice towards men disposes one to respect the rights of each and to establish in human relationships the harmony that promotes equity with regard to persons and to the common good” (CCC, n. 1807). Mercy, on the other hand, goes beyond justice. As an expression of charity, mercy is heartfelt sympathy for another’s distress. Mercy, however, should not be confused with mere sympathy or pity for another: “Mercy, founded on compassion, differs from compassion or the feeling of sympathy insofar as mercy implements this feeling with a ready desire to render assistance—the essential element of mercy. The works of mercy are the methods or actions which express this desire.”<sup>13</sup> Traditionally, the Church classifies these works as the corporal<sup>14</sup> and spiritual works of mercy.<sup>15</sup>

<sup>11</sup> Ibid.

<sup>12</sup> See “Virtue” in F. ROBERTI (comp.) and P. PALAZZINI (gen. ed.), *Dictionary of Moral Theology*, Westminster, MD, Newman Press, 1962, 1278. See also *Summa Theologiae*, I-II, q. 61.

<sup>13</sup> “Mercy (Works of),” in F. ROBERTI (comp.) and P. PALAZZINI (gen. ed.), *Dictionary of Moral Theology*, Westminster, MD, Newman Press, 1962, 781.

<sup>14</sup> The seven corporal works of mercy: feed the hungry; give drink to the thirsty; clothe the naked; shelter the homeless; visit the sick; visit the imprisoned; bury the dead. (*Compendium of the Catechism of the Catholic Church*, Ottawa, Concacan, 2006, 186).

<sup>15</sup> The seven spiritual works of mercy: counsel the doubtful; instruct the ignorant; admonish sinners; comfort the afflicted; forgive offenses; bear wrongs patiently; prayer for the living and the dead. (Ibid.).

Mercy, as an expression of charity, goes beyond justice but never against it. St. Thomas Aquinas, for instance, discussed whether mercy could be attributed to God and, if so, whether it was contrary to God's justice. Aquinas responded:

God acts mercifully, not indeed by going against His justice, but by doing something more than justice; thus a man who pays another two hundred pieces of money, though owing him only one hundred, does nothing against justice, but acts liberally or mercifully. The case is the same with one who pardons an offence committed against him, for in remitting it he may be said to bestow a gift. Hence the Apostle calls remission a forgiving: "Forgive one another, as Christ has forgiven you" (Eph. iv. 32). Hence it is clear that mercy does not destroy justice, but in a sense is the fulness thereof. And thus it is said: "Mercy exalteth itself above judgment" (Jas. ii. 13).<sup>16</sup>

More recently, Pope Benedict reflected on the relationship between charity and justice in his encyclical *Caritas in veritate*. He notes that charity demands justice, a recognition of the rights of individuals, in the promotion of the common good.

*Charity goes beyond justice*, because to love is to give, to offer what is "mine" to the other; but it never lacks justice, which prompts us to give the other what is "his", what is due to him by reason of his being or his acting. I cannot "give" what is mine to the other, without first giving him what pertains to him in justice. If we love others with charity, then first of all we are just towards them. Not only is justice not extraneous to charity, not only is it not an alternative or parallel path to charity: justice is inseparable from charity, and intrinsic to it. [...] <sup>17</sup>

Dangers can arise when charity or mercy, masquerading as a "pastoral" response, cause ecclesiastical authorities and ministers of justice to set aside the requirements of law, requirements that exist in justice. The crisis of confidence in ecclesiastical authorities, precipitated by the sexual abuse of minors and other forms of clerical misconduct, may be attributed to such an

<sup>16</sup> AQUINAS, *Summa Theologiae*, I, q. 21, a. 3 ad 2. English translation from FATHERS OF THE ENGLISH DOMINICAN PROVINCE, *Summa Theologica*, New York, Benziger Brothers, Inc., 1947, vol. I, 119.

<sup>17</sup> BENEDICT XVI, Encyclical Letter on Integral Human Development in Charity and Truth *Caritas in veritate*, n. 6, 29 June 2009, in AAS, 101 (2009), 644, English translation in *Origins*, 39 (2009-2010), 131. Benedict added, in his allocution to the Roman Rota in 2010: "Charity without justice is not charity, but a counterfeit, because charity itself requires that objectivity which is typical of justice and which must not be confused with inhuman coldness." BENEDICT XVI, Allocution to the Roman Rota, 29 January 2010, in AAS, 102 (2010), 110-114, English translation in W.H. WOESTMAN, *Allocutions to the Roman Rota*, Ottawa, Faculty of Canon Law, Saint Paul University, 2011, 308 (= WOESTMAN, *Allocutions to the Roman Rota*).

approach—a misplaced compassion for both victims and perpetrators that resulted in the disregard for penal law and the imposition of appropriate sanctions. Similarly, neglecting to fulfil the dictates of procedural law in marriage nullity proceedings, such as publishing the acts of a case on the grounds that it may offend or otherwise upset one or both of the parties, is not a “pastoral” or “charitable” response but an injustice, a denial of the right of defense. John Paul II, in his 1990 allocution to the Roman Rota, reflected on the relationship between the pastoral and juridical dimensions of the Church’s solicitude for the Christian faithful and cautioned against the creation of a false dichotomy.

4. The juridical and the pastoral dimension are united inseparably in the Church, pilgrim on this earth. Above all, they are in harmony because of their common goal—the salvation of souls. But there is more. In effect, juridical-canonical activity is pastoral by its very nature. It constitutes a special participation in the mission of Christ, the shepherd (*pastore*), and consists in bringing into reality the order of intra-ecclesial justice willed by Christ himself. Pastoral work, in its turn, while extending far beyond juridical aspects alone, always includes a dimension of justice. In fact, it would be impossible to lead souls toward the kingdom of heaven without that minimum of love and prudence that is found in the commitment to seeing to it that the law and the rights of all in the Church are observed faithfully.

It follows from this that any opposition between the pastoral and the juridical dimensions is deceptive. It is not true that, to be more pastoral, the law should become less juridical. Surely, the very many expressions of that flexibility that have always marked canon law, precisely for pastoral reasons, must be kept in mind and applied. But the demands of justice must be respected also; they may be superseded because of that flexibility, but never denied. In the Church, true justice, enlivened by charity and tempered by equity, always merits the descriptive adjective pastoral. There can be no exercise of pastoral charity that does not take account, first of all, of pastoral justice.<sup>18</sup>

Charity and mercy, then, are not opposed to justice. Instead, mercy is the completion or perfection of justice. Mercy, as the composition of the word suggests, consists of having a compassionate heart; that is, a heart that takes on the misery of another person. [...] Therefore, the action proper to mercy is to remove someone else’s misery.”<sup>19</sup> Pope Francis provides a similar description of mercy.

Etymologically, “mercy” derives from *misericordis*, which means opening one’s heart to wretchedness. And immediately we go to the Lord: mercy is

<sup>18</sup> JOHN PAUL II, Allocution to the Roman Rota, 18 January 1990, AAS, 82 (1990), 874, English translation in WOESTMAN, *Allocutions to the Roman Rota*, 210-211.

<sup>19</sup> E. BAURA, “Mercy, *Oikonomia*, and Law in the Canonical Marriage System,” in P.M. DUGAN and L. NAVARRO (eds.), *Mercy and Law in Marriage*, Montreal, Wilson & Lafleur, 2015, 11-12.

the divine attitude which embraces, it is God's giving himself to us, accepting us, and bowing to forgive. Jesus said he came not for those who were good but for the sinner. He did not come for the healthy, who do not need the doctor, but for the sick. For this reason, we can say that mercy is God's identity card. God of mercy, merciful God. For me, this really is the Lord's identity.<sup>20</sup>

Similarly, in the Bull *Misericordiae vultus*, Pope Francis reflects briefly on the relationship between justice and mercy. Like his predecessors, he sees no contradiction between the two, and affirms that "[m]ercy is not opposed to justice but rather expresses God's way of reaching out to the sinner, offering him a new chance to look at himself, convert, and believe" (n. 21).<sup>21</sup> He continues:

If God limited himself to only justice, he would cease to be God, and would instead be like human beings who ask merely that the law be respected. But mere justice is not enough. Experience shows that an appeal to justice alone will result in its destruction. This is why God goes beyond justice with his mercy and forgiveness. Yet this does not mean that justice should be devalued or rendered superfluous. On the contrary: anyone who makes a mistake must pay the price. However, this is just the beginning of conversion, not its end, because one begins to feel the tenderness and mercy of God. God does not deny justice. He rather envelopes it and surpasses it with an even greater event in which we experience love as the foundation of true justice.<sup>22</sup>

Within this context, having considered the relationship between justice and mercy, we can now consider the role of confessors as ministers of both divine justice and mercy. We will do so by examining several juridical aspects of the Sacrament of Penance, where the faithful, according to *Lumen gentium*, "obtain pardon from God's mercy for the offence committed against him, and are, at the same time, reconciled with the Church which they have wounded by their sins and which by charity, by example and by prayer labors for their conversion" (n. 11).<sup>23</sup>

## 2 — *The Availability of the Sacrament of Penance*

Members of the Christian faithful are "obliged to confess in kind and number all grave sins committed after baptism and not yet remitted directly through the

<sup>20</sup> FRANCIS, *The Name of God is Mercy*, New York, Random House, 2016, 8-9.

<sup>21</sup> FRANCIS, *Misericordiae vultus*, n. 21.

<sup>22</sup> Ibid.

<sup>23</sup> SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church *Lumen gentium*, 21 November 1964, in AAS, 57 (1965), 15, English translation A. FLANNERY, *Vatican Council II: The Conciliar and Post Conciliar Documents*, Northport, NY, Costello Publishing Company, 1988, 362.

keys of the Church nor acknowledged in individual confession, of which the person has knowledge after diligent examination of conscience” (c. 988 § 1). All those to whom the care of souls has been committed in virtue of some function, such as pastors, “are obliged to make provision so that the confessions of the faithful entrusted to them are heard when they reasonably ask to be heard and that they have the opportunity to approach individual confession on days and at times established for their convenience” (c. 986 § 1). This two-fold obligation, on the part of the penitent and confessor, gives rise to distinct issues: (1) the availability of the sacrament; and (2) the appropriate place for its celebration.

## 2.1 — The Availability of the Sacrament of Penance

Canon 986 identifies the duty to hear confessions and distinguishes between: (1) confessors to whom the care of souls has been entrusted in virtue of some function; and (2) confessors without such obligations. A confessor is a priest with a requisite faculty to hear confessions and grant absolution of sin. A priest alone is the minister of the sacrament of reconciliation (c. 965), yet, in addition to the power of orders, a faculty is needed for the valid absolution of sins (c. 966 § 1). This faculty is obtained either by the law itself, as outlined in canon 968, or by grant of the competent authority, identified in canon 969 (c. 966 § 2).<sup>24</sup>

There is a twofold obligation imposed upon those to whom the care of souls has been entrusted, such as diocesan bishops, pastors, and those who take the place of pastors. They are to ensure that confessions are heard when the faithful reasonably seek to be heard, and that the faithful have the opportunity to approach individual confession “on days and times established for their convenience” (c. 986 § 1). Pastors and others to whom the care of souls has been entrusted in virtue of some office have an obligation in justice to hear the confessions of the faithful entrusted to their care in such circumstances. Halligan notes: “This obligation in justice derives from the tacit contract with those from whom they receive sustenance and honor under the condition that they celebrate or administer the sacraments, and with their ecclesiastical superior who appoints them with the understanding that they faithfully discharge their office, of which the celebration of Penance is a part.”<sup>25</sup>

<sup>24</sup> A comprehensive overview of those who enjoy the faculty of hearing confessions habitually in virtue of office can be found in B.T. AUSTIN, “The Faculty of Hearing Confessions of Any of the Faithful Everywhere (*Ubique*),” in *RR 2019*, 51-54.

<sup>25</sup> N. HALLIGAN, *Sacraments of Reconciliation: Penance, Anointing of the Sick*, New York, Alba House, 1973, 52.

The *Rite of Penance* repeats this obligation in an exhortatory fashion: “The confessor should always show himself to be ready and willing to hear the confessions of the faithful whenever they reasonably request this” (n. 10b). By doing so, the confessor assists the faithful in fulfilling their obligation to approach individual confession—“the only ordinary means by which a member of the faithful conscious of grave sin is reconciled with God and the Church” (c. 960).

As a means of promoting the full, conscious, and active participation of the faithful in the liturgical rites, the faithful are encouraged to approach the sacrament of penance outside the celebration of Mass. Although this is a convenient time for the faithful, it can also interfere with participation in the Mass. The instruction *Eucharisticum mysterium* recalled that approaching the sacrament outside of Mass will ensure that “the sacrament of penance will be administered calmly and with genuine profit, and will not interfere with the active participation in the Mass” (n. 35).<sup>26</sup> Similarly, the *Rite of Penance* states that the faithful “should be encouraged to approach the sacrament of penance at times when Mass is not being celebrated and preferably at the scheduled hours.”<sup>27</sup>

In view of the significant decline in participation in the sacrament of penance, more recent documents of the Holy See favour the greatest possible provision for hearing confessions, not excluding during the celebration of Mass. John Paul II, in *Misericordia Dei*, notes:

2. Local Ordinaries, and parish priests and rectors of churches and shrines, should periodically verify that the greatest possible provision is in fact being made for the faithful to confess their sins. It is particularly recommended that in places of worship confessors be visibly present at the advertised times, that these times be adapted to the real circumstances of penitents, and that confessions be especially available before Masses, and even during Mass if there are other priests available, in order to meet the needs of the faithful.

Likewise, *Redemptionis Sacramentum*, n. 76 does not exclude hearing confessions in the same place where Mass is being celebrated, provided that priests who are not celebrating or concelebrating are available, and that this occurs “in an appropriate manner.”<sup>28</sup> The availability to hear confessions,

<sup>26</sup> CONGREGATION FOR SACRED RITES, Instruction *Eucharisticum mysterium*, 27 May 1967, in AAS, 59 (1967), 561, English translation in *CLD*, vol. 6, 538.

<sup>27</sup> *Ordo Paenitentiae*, editio typica, 2 December 1973, n. 13, Typis Polyglottis Vaticanis, 1974, 16, English translation in *The Rites of the Catholic Church*, New York, Pueblo Publishing Company, 1990, vol. 1, 533.

<sup>28</sup> CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Instruction *Redemptionis Sacramentum*, 25 March 2004, in AAS, 96 (2004), 573, English translation in *Origins*, 33 (2003-2004), 810-811.



then, should be seen as an expression of pastoral charity, reflecting the image of the Good Shepherd. The Congregation for the Clergy reinforced this in *The Priest, Minister of Divine Mercy*.

55. By virtue of the fact that the priest acts in the name of Christ, the Good Shepherd, he has a compelling obligation to know the spiritual maladies of his flock and also to be close to the penitent. [...] He should also be available to those who reasonably request the sacrament and to follow the promptings of the Holy Spirit. This is a fraternal and paternal function of imitating the Good Shepherd and a pastoral priority. Christ, present in the celebration of the sacraments, is to be found in the hearts of penitents and calls his minister to prayer, study, the invocation of the Holy Spirit and paternal welcoming.<sup>29</sup>

Indeed, the *Rite of Penance* notes that “the reconciliation of penitents may be celebrated in all liturgical seasons and on any day” (n. 13). While the faithful “should be encouraged to approach the sacrament of penance at times when Mass is not being celebrated and preferably at the scheduled hours” (n. 13),<sup>30</sup> every effort should be made to make individual sacramental confession available whenever it is reasonably requested.

During the Jubilee Year of Mercy, Pope Francis introduced two extraordinary measures to make the Sacrament of Penance more widely available and accessible to the faithful. In *Misericordia vultus*, inaugurating the Jubilee Year of Mercy, Pope Francis signaled his intention to appoint “missionaries of mercy,” and asked that bishops welcome these “persuasive preachers of mercy” (n. 18) into each diocese. He describes their function as follows:

They will be a sign of the Church’s maternal solicitude for the People of God, enabling them to enter the profound richness of this mystery so fundamental to the faith. There will be priests to whom I will grant the authority to pardon even those sins reserved to the Holy See, so that the breadth of their mandate as confessors will be even clearer. They will be, above all, living signs of the Father’s readiness to welcome those in search of his pardon. They will be missionaries of mercy because they will be facilitators of a truly human encounter, a source of liberation, rich with responsibility for overcoming obstacles and taking up the new life of Baptism again. They

<sup>29</sup> CONGREGATION FOR CLERGY, *The Priest, Minister of Divine Mercy. An Aid for Confessors and Spiritual Directors*, 9 March 2011, Vatican City, Libreria Editrice Vaticana, 2011, 24-25.

<sup>30</sup> John Paul II, in *Pastores gregis*, 39, recalls the role of the diocesan bishop in ensuring that the sacrament of penance is widely available: “The Bishop will not fail to remind all those who by virtue of office are charged with the care of souls that they have the duty to provide the faithful with the opportunity of making an individual confession. He himself will make certain that the faithful are in fact being assisted in every way possible to make their confession.” (JOHN PAUL II, Post-Synodal Apostolic Exhortation on the Bishop, Servant of the Gospel of Jesus Christ for the Hope of the World *Pastores gregis*, 16 October 2003, in AAS, 96 [2004], 877, English translation in *Origins*, 33 [2003-2004], 373).

will be led in their mission by the words of the Apostle: “For God has consigned all men to disobedience, that he may have mercy upon all” (*Rom* 11:32). Everyone, in fact, without exception, is called to embrace the call to mercy. May these Missionaries live this call with the assurance that they can fix their eyes on Jesus, “the merciful and faithful high priest in the service of God” (*Heb* 2:17).<sup>31</sup>

Pope Francis indicated that the missionaries of mercy would be authorized to pardon “sins” reserved to the Holy See. The Pontifical Council for Promoting New Evangelization clarified, by means of letters to all missionaries of mercy, that they have the faculty to remit, in the internal forum, *latae sententiae* excommunications reserved to the Apostolic See for the following delicts:<sup>32</sup>

1. Profaning the Eucharistic species by taking them away or keeping them for a sacrilegious purpose (c. 1382 § 1);
2. Use of physical force against the Roman Pontiff (c. 1370 § 1);
3. Absolution of an accomplice in a sin against the Sixth Commandment of the Decalogue (c. 1384);
4. A direct violation of the sacramental seal by a confessor (c. 1386 § 1); and
5. The recording by means of a technical device of what the priest or the penitent says in a Sacramental Confession (whether real or simulated), or the divulging of such a recording through the means of social communication (c. 1386 § 3; cf. Congregation for the Doctrine of the Faith, *Decretum de sacramenti Paenitentiae dignitate tuenda*, 23 September 1988).<sup>33</sup>

Although intended initially for only the Jubilee Year of Mercy, Pope Francis extended the mandate of missionaries of mercy, by means of *Misericordia et misera*, “until further notice as a concrete sign that the grace of the jubilee remains alive and effective the world over.”<sup>34</sup>

<sup>31</sup> FRANCIS, *Misericordiae vultus*, n. 18.

<sup>32</sup> The canon references included in parentheses conform to the modifications introduced to the Code of Canon Law by means of the Apostolic Constitution *Pascite gregem Dei*, 23 May 2021.

<sup>33</sup> PONTIFICAL COUNCIL FOR PROMOTING NEW EVANGELIZATION, Letter to Missionaries of Mercy, Prot. No. IM/356/2016/P, 10 February 2016, <https://missionariesofmercyusa.org/wp-content/uploads/2020/02/2.10.16-Faculties-Letter.png>. This last delict was added to the list of faculties granted to missionaries of mercy following the close of the Jubilee of Mercy (PONTIFICAL COUNCIL FOR PROMOTING NEW EVANGELIZATION, Letter to Missionaries of Mercy, Prot. No. NE/532/2017/P, 26 April 2017, <https://missionariesofmercyusa.org/wp-content/uploads/2020/02/4.26.17-Extension-of-Faculties-Letter.pdf>).

<sup>34</sup> FRANCIS, Apostolic Letter at the Conclusion of the Extraordinary Jubilee of Mercy *Misericordia et misera*, 20 November 2016, n. 9, in AAS, 108 (2016), 1318, English translation in *Origins*, 46 (2016-2017), 421 (= FRANCIS, *Misericordia et misera*).

In addition, as a sign that the Jubilee Year “excludes no one,” Pope Francis made special provision for “those faithful who for various reasons choose to attend churches officiated by priests of the Fraternity of St Pius X.” Although not in full communion, Pope Francis determined that “those who during the Holy Year of Mercy approach these priests of the Fraternity of St Pius X to celebrate the sacrament of reconciliation shall validly and licitly receive the absolution of their sins.”<sup>35</sup> While only intended for the Jubilee of Mercy, Pope Francis extended this until “further provisions are made,” by means of *Misericordia et misera*.

Whether by sending “missionaries of mercy” or by means of the extraordinary provision for those approaching the sacrament from priests of the Fraternity of St. Pius X, Pope Francis has signaled his desire that the Sacrament of Penance be made generously available to all those who seek it with sincere and contrite hearts, “lest anyone ever be deprived of the sacramental sign of reconciliation through the Church’s pardon.”<sup>36</sup>

## 2.2 — The Appropriate Place for the Celebration of the Sacrament of Penance

The proper place to hear sacramental confessions is a church or an oratory (c. 964 § 1). Churches and oratories are both sacred places, designated for divine worship by means of a dedication or blessing (c. 1205). A church is “a sacred building designated for divine worship to which the faithful have the right of entry for the exercise, especially the public exercise, of divine worship” (c. 1214), whereas an oratory is “a place for divine worship designated by the permission of the ordinary for the benefit of some community or group of the faithful who gather in it and to which other members of the faithful can also come with the consent of the competent superior” (c. 1223). In other words, both are places set apart for divine worship; they differ in how and by whom they are used.

Confessions are not to be heard outside a confessional without just cause (c. 964 § 3). A confessional is a place within the church or oratory for hearing

<sup>35</sup> FRANCIS, Letter to Archbishop Rino Fisichella, President of the Pontifical Council for Promoting the New Evangelization, 1 September 2015, in *Origins*, 45 (2015-2016), 251. Following this, Pope Francis “decided to authorize local ordinaries the possibility to grant faculties for the celebration of marriages of faithful who follow the pastoral activity of the society,” under certain circumstances. (See PONTIFICAL COMMISSION *ECCLESIA DEI*, Letter to ordinaries concerning the faculties for the celebration of marriages of the faithful of the Society Saint Pius X, 27 March 2017, in *Origins*, 46 [2016-2017], 705-706).

<sup>36</sup> FRANCIS, *Misericordia et misera*, n. 12.

confessions, separating the confessor from the penitent by means of a fixed grille. “The grille [...] is meant to safeguard the necessary discretion, guaranteeing the right of all the faithful to confess their sins without necessarily having to reveal their personal identity.”<sup>37</sup> Conferences of bishops are to establish norms regarding the confessional, but canon 964 § 2 indicates that they must ensure “that there are always confessionals with a fixed grate between the penitent and the confessor in an open place so that the faithful who wish to can use them freely.” The use of “reconciliation rooms” which facilitate face-to-face interactions are in no way excluded, provided a fixed grille is available, if desired, to ensure anonymity on the part of the penitent. Despite this provision, the Pontifical Council for the Interpretation of Legislative Texts, in an authentic interpretation, clarified that confessors may insist upon the use of a confessional with a fixed grille, for a just cause and apart from a case of necessity, even if the penitent may request otherwise. The practical importance of this authentic interpretation is undeniable within the context of ensuring a safe environment and protecting both the confessor and penitent from any danger or suspicion.<sup>38</sup>

During the COVID-19 pandemic, accommodations have been necessary to ensure safety and compliance with public health regulations. Observance of these public health regulations certainly presents a “just cause” for hearing confessions outside a confessional (c. 964 § 3). Indeed, the Apostolic Penitentiary noted that it belongs to diocesan bishops to implement safeguards during the pandemic for the individual celebration of the Sacrament of Penance, while protecting the inviolability of the sacramental seal. Measures recommended include hearing confessions in a well-ventilated place, outside the confessional; adopting a suitable distance between priest and penitent; and using protective masks. The Apostolic Penitentiary did not exclude recourse to general absolution, leaving it to diocesan bishops to determine if “grave necessity” exists in view of the level of pandemic contagion and the restrictions on public gatherings (cf. c. 961).<sup>39</sup>

<sup>37</sup> W.H. STETSON, “Tit. IV Ch. I. *The Celebration of the Sacrament*,” in *Exegetical Comm*, vol. III/1, 769.

<sup>38</sup> “Q. – Whether, in view of what is prescribed in c. 964, §2, the minister of the sacrament, for a just reason and apart from a case of necessity, can lawfully decide, even if the penitent may request otherwise, that a sacramental confession be heard in a confessional equipped with a fixed grille? R. – *Affirmative*.” (PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, *Responsio ad propositum dubium de loco excipiendi sacramentales confessiones*, 7 July 1998, in *AAS*, 90 [1998], 711, English translation in *CCLA2*, 1629).

<sup>39</sup> APOSTOLIC PENITENTIARY, *Note on the Sacrament of Reconciliation in the Present Emergency of the Coronavirus*, 19 March 2020, in *Origins*, 49 (2019-2020), 708.

### 3 — *The Manner of Questioning the Penitent*

Penitents are to confess their sins “in kind and number,” that is, making known the nature and frequency of each grave sin (c. 988 § 1). This is so that the confessor can, with sufficient knowledge, make a judgement and provide appropriate advice to the penitent. Halligan notes: “[a]s a judge the minister must know the penitent’s case and thus he has an obligation to question about those things concerning the penitent which are necessary to form a prudent judgment, primarily to ensure the integrity of the confession and less frequently to discover the penitent’s dispositions.”<sup>40</sup> The theological significance of this encounter and dialogue between the penitent and confessor is reinforced in the rubrics of *Rite of Penance*.

It is not simply a question of the penitent speaking out a list of sins as if into the air or to no one. One confesses to the priest. The priest, for his part, is instructed to engage in a careful interaction with the one confessing: “If necessary, the priest helps the penitent to make an integral confession and gives him suitable counsel”. This back and forth between penitent and priest is nothing less than the ritual form that enacts the penitent’s encounter with Christ himself in the person of the priest. For this reason the priest is instructed to help the penitent to understand the deepest meaning of this encounter. “He [the priest] urges him [the penitent] to be sorry for his faults, reminding him that through the Sacrament of penance the Christian dies and rises with Christ and is thus renewed in the paschal mystery” (RP 44). This is an essential theological point for understanding the Sacrament rightly. All that happens in this Sacrament is rooted in the Paschal Mystery. The penitent is renewed in the original pattern of his baptism, where one dies with Christ to sin and rises with him to new life.<sup>41</sup>

However, there is a danger that a confessor may ask inappropriate questions, under the guise of assisting the penitent. In light of this, the 1983 Code of Canon Law cautions against imprudent questionings: “In posing questions, the priest is to proceed with prudence and discretion, attentive to the condition and age of the penitent, and is to refrain from asking the name of an accomplice” (c. 979). The 1917 Code of Canon Law contained a similar caution, yet was more specific in the types of matters to be avoided. “Let [priests] in all respects avoid inquiring about the names of accomplices as well as useless or curious questions,

<sup>40</sup> N. HALLIGAN, *The Sacraments and Their Celebration*, New York, Alba House, 1986, 101 (= HALLIGAN, *The Sacraments and Their Celebration*).

<sup>41</sup> “Rediscovering the ‘Rite of Penance’,” in *Notitiae*, 51 (2015), 373.

particularly about the sixth commandment of the Decalogue, and particularly when they inquire about such things with young people ignorant of them” (c. 888 § 2).<sup>42</sup>

Although inappropriate questioning about the sixth commandment is not explicitly addressed in the 1983 Code of Canon Law, it is certainly covered by the more general formulation to proceed with “prudence and discretion.” In all matters, “questions should never be curious, useless, calculated to scandalize, or meticulous.”<sup>43</sup> Imprudent questions, particularly on matters pertaining to chastity, have the potential to embarrass, humiliate, or even scandalize the penitent. Instead, the role of the confessor is to “make present the mercy of the Father and the compassion of Jesus Christ. [...] Harshness, rebuke, inquisitorial questionings and censoriousness are out of harmony with it.”<sup>44</sup> When in doubt, the Holy Office warned, in words equally applicable today, that “it is better to err on the side of caution than to expose oneself or another to ruin by going too far.”<sup>45</sup>

Pope Francis recalled in *Evangelii gaudium* that “the confessional must not be a torture chamber but rather an encounter with the Lord’s mercy

<sup>42</sup> Translation taken from E.N. PETERS (curator), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, 314. The sixth commandment of the Decalogue: “You shall not commit adultery” (Ex 20:14; Deut 5:18). As the *Catechism of the Catholic Church* states: “The tradition of the Church has understood the sixth commandment as encompassing the whole of human sexuality” (CCC, n. 2336).

<sup>43</sup> Henry DAVIS, *Moral and Pastoral Theology*, London and New York, Sheed and Ward, 1958, vol. 3, 274 (= DAVIS, *Moral and Pastoral Theology*). Similarly, the Holy Office recalled, in its 1943 instruction: “... the confessor, in asking questions, should always proceed with greatest caution, asking first rather general questions and later, if the case requires it, more definite ones; and these latter should always be brief, discreet, decent, avoiding absolutely any expressions which might excite the imagination or the senses or give offense to a pious soul.” (HOLY OFFICE, Instruction on the conduct of confessors in dealing with the sixth commandment, 16 May 1943, in *CLD*, vol. 3, 381 [= HOLY OFFICE, Instruction on the conduct of confessors]).

<sup>44</sup> J.D. CRICHTON, *The Ministry of Reconciliation: A Commentary on the Order of Penance 1974*, London, Geoffrey Chapman, 1974, 34.

<sup>45</sup> HOLY OFFICE, Instruction on the conduct of confessors, 381. The earlier *Rituale Romanum* provided similar advice to confessors: “16. If the penitent does not mention the number, species, and circumstances of sins which require such explanation, the priest shall prudently question him. 17. But he must be careful not to discourage anyone by curious or useless questions; let him especially avoid imprudent questioning of young boys or girls (or others) concerning matters with which they are unacquainted, lest they be scandalized and learn thereby to commit certain sins.” (*The Roman Ritual: Complete Edition*, trans. P.T. WELLER, Milwaukee, The Bruce Publishing Company, 1964, 187).

which spurs us to do our best.”<sup>46</sup> Asked to clarify, Francis provided wise advice to confessors.

Those words were directed more to priests, to confessors. And they referred to the fact that some confessors can be excessively curious, their curiosity can be a little unhealthy. I once heard about a woman, married for years, who stopped going to confession because when she was a girl of thirteen or fourteen, the confessor asked her where she put her hands when she slept. There can be an excess of curiosity, especially in sexual matters. Or an insistence for people to be explicit about details that are not necessary. Anyone who confesses does well to feel shame for his sins: shame is a grace we ask for; it is good, positive, because it makes us humble. But in a dialogue with a confessor we need to be listened to, not interrogated. Then the confessor says whatever he needs to and offers advice delicately. This is what I meant when I said that confessional should never be torture chambers.<sup>47</sup>

To assist the penitent to make a heartfelt and integral confession, judicious and circumspect questions are necessary. In the ordinary contentious process, canon 1564 indicates that, questions are “to be brief, accommodated to the mental capacity of the person being questioned, not comprised of several points at the same time, not deceitful or deceptive or suggestive of a response, free from any kind of offense, and pertinent to the case being tried.” Questions posed in the internal sacramental forum should share these same characteristics. After all, such questions are being directed to one who has already made a self-accusation before the Church’s minister, one who has manifested his conscience in good faith, and one who is seeking reconciliation before the Church’s tribunal of mercy. Where confessors have failed in this regard by engaging in a line of inappropriate or imprudent questioning, especially regarding the sixth commandment, the matter should be referred to the competent ecclesiastical authority, such as a diocesan bishop or religious superior, who will investigate the matter. If necessary, the faculties of the priest to hear confessions may be revoked for a grave cause (c. 974).

#### **4 — *Discerning the Disposition of the Penitent and Withholding Absolution***

The 1983 Code describes the interior disposition required on the part of the penitent. “To receive the salvific remedy of the sacrament of penance, a

<sup>46</sup> FRANCIS, Encyclical letter on the Proclamation of the Gospel in Today’s World *Evangelii gaudium*, 24 November 2013, n. 44, in AAS, 105 (2013), 1038, English translation in *Origins*, 43 (2013-2014), 429 (= FRANCIS, *Evangelii gaudium*).

<sup>47</sup> FRANCIS, *The Name of God is Mercy*, New York, Random House, 2016, 27.

member of the Christian faithful must be disposed in such a way that, rejecting sins committed and having a purpose of amendment, the person is turned back to God” (c. 987). In other words, contrition is the most important and essential act of the penitent.<sup>48</sup> The *Rite of Penance* states: “The genuineness of penance depends on this heartfelt contrition. For conversion should affect a person from within toward a progressively deeper enlightenment and an ever-closer likeness to Christ” (n. 6a). Contrition is much more than a matter of feeling guilty or remorseful. There must be a sincere and firm intention to amend one’s life. Without such a disposition, absolution cannot be validly administered.

The very fact of approaching the sacrament usually implies contrition, and the penitent should be presumed to be acting in good faith. The *vademecum* for confessors concerning some aspects of the morality of conjugal life, issued in 1997 by the Pontifical Council for the Family, reinforces this principle. “The minister of Reconciliation should always keep in mind that the sacrament has been instituted for men and women who are sinners. Therefore, barring manifest proof to the contrary, he will receive the penitents who approach the confessional taking for granted their good will to be reconciled with the merciful God, a good will that is born, although in different degrees, of a contrite and humbled heart (Psalm 50:19).”<sup>49</sup>

“If the confessor has no doubt about the disposition of the penitent, and the penitent seeks absolution,” canon 980 states, “absolution is to be neither refused nor deferred.” The presumption, which can only be overturned with proof to the contrary, is that the penitent has sincerely confessed his or her sins and is thereby disposed to receive absolution. If the penitent refuses to express sorrow or a resolve to amend his or her life, the confessor should try

<sup>48</sup> The *Catechism of the Catholic Church* states: “Among the penitent’s acts contrition occupies first place. Contrition is ‘sorrow of the soul and detestation for the sin committed, together with the resolution not to sin again’ (CCC, n. 1451). The Catechism also distinguishes between perfect and imperfect contrition: “When it arises from a love by which God is loved above all else, contrition is called ‘perfect’ (contrition of charity). Such contrition remits venial sins; it also obtains forgiveness of mortal sins if it includes the firm resolution to have recourse to sacramental confession as soon as possible” (CCC, n. 1452). “The contrition called ‘imperfect’ (or ‘attrition’) is also a gift of God, a prompting of the Holy Spirit. It is born of the consideration of sin’s ugliness or the fear of eternal damnation and the other penalties threatening the sinner (contrition of fear). Such a stirring of conscience can initiate an interior process which, under the prompting of grace, will be brought to completion by sacramental absolution. By itself however, imperfect contrition cannot obtain the forgiveness of grave sins, but it disposes one to obtain forgiveness in the sacrament of Penance” (CCC, n. 1453).

<sup>49</sup> PONTIFICAL COUNCIL FOR THE FAMILY, *Vademecum* for Confessors concerning Some Aspects of the Morality of Conjugal Life, 12 February 1997, in *CLD*, vol. 14, 902 (= PONTIFICAL COUNCIL FOR THE FAMILY, *Vademecum* for Confessors).



to bring about a proper disposition in the penitent before denying or delaying absolution. Even pre-conciliar manuals of moral theology were firm on this point. Henry Davis, in his classic work *Moral and Pastoral Theology*, states: “A confessor must, in general, believe a penitent both when he accuses and when he excuses himself. He must refuse to give absolution when he knows for certain that a penitent is concealing a mortal sin in serious bad faith. This contingency would arise very rarely.”<sup>50</sup>

In the *vademecum* for confessors, the Pontifical Council for the Family warned against demanding too much of penitents: “In accordance with the approved doctrine and practice followed by the holy Doctors and confessors with regard to habitual penitents, the confessor is to avoid demonstrating lack of trust either in the grace of God or in the dispositions of the penitent, by exacting humanly impossible absolute guarantees of an irreproachable future conduct.”<sup>51</sup> The law wishes to avoid “excessive rigor and severity on the part of the confessor,” since the refusal of absolution is “an extreme and odious measure, which should only be taken for certain and serious reasons.”<sup>52</sup> Generally, the very fact that one approached the sacrament is a clear sign of the proper disposition of the penitent.

In a 2016 address to the participants of a course sponsored by the Apostolic Penitentiary, Pope Francis indicated how he approaches penitents who seem to lack the proper disposition. He provides three suggestions.

And what do I do if I run into trouble and can't give absolution? What must be done? First of all, try to see if there is a way; there frequently is. Second, don't just bind yourselves by spoken language, but also to body language. There are people who can't speak but by their gestures they show their repentance, their sorrow. And third, if you can't give absolution, speak to them like a father: “Listen, because of this I cannot [absolve you], but I can assure you that God loves you, God is waiting for you! Let us pray together to Our Lady, that she protect you; and come, come back. I will wait for you just as God is waiting for you.”

And give them a blessing. That way, this person leaves the confessional and thinks: “I found a father and he didn't hit me.” How many times have you heard someone say: “I never go to confession, because this one time I went and he yelled at me”? Even in the extreme case in which I cannot give absolution, let him or her feel the warmth of a father! Let them be blessed and be called back. And also may you pray a little for him or for her. This

<sup>50</sup> DAVIS, *Moral and Pastoral Theology*, 275.

<sup>51</sup> PONTIFICAL COUNCIL FOR THE FAMILY, *Vademecum* for Confessors, 906.

<sup>52</sup> Fernando LOZA, “Tit. IV Ch. II. The Minister of the Sacrament of Penance,” in *Exegetical Comm*, vol. III/1, 806-807.

is always the point: there's a father there. And this too is a celebration, and God knows how to forgive things better than we do. But at least we can be an image of the Father.<sup>53</sup>

Mercy demands that the confessor welcome the penitent as a loving father. Indeed, the *Rite of Penance* recalls the paternal function of confessors. "By receiving repentant sinners and leading them to the light of the truth, the confessor fulfills a paternal function: he reveals the heart of the Father and reflects the image of Christ the Good Shepherd. He should keep in mind that he has been entrusted with the ministry of Christ, who accomplished the saving work of human redemption by mercy and who by his power is present in the sacraments" (n. 10c). To be pastorally efficacious, the confessor must meet the penitent with tenderness. This requires that the penitent's good will and proper disposition be presumed. Every effort should be made to bring about true contrition before refusing absolution. The confessional should never be a "torture chamber" but "an encounter with the Lord's mercy which spurs us on to do our best."<sup>54</sup>

## 5 — *Imposition of Appropriate Penances*

An often misunderstood or overlooked dimension of the Sacrament of Reconciliation is the imposition of an appropriate penance, a duty recalled by the Council of Trent.

Hence the priests of the Lord have the duty to impose salutary and proportionate satisfactions as suggested by spiritual prudence, in accordance with the nature of the crime and the ability of the penitents, lest they become partakers of the sins of others [*cf. 1 Tim 5:22*] if they connive at their sins and deal too leniently with them by imposing only some sort of slight penance for very grave delicts. Let them keep in mind that the satisfaction imposed by them is meant not merely as a safeguard for the new life and as a remedy to weakness, but also for the retribution and chastisement of former sins. For the early Fathers also believe and teach that the keys of the priests are given not only to loose but also to bind [*cf. Mt 16:19; 18:18; Jn 20:23; can. 15*].<sup>55</sup>

<sup>53</sup> FRANCIS, Address to participants in a course on the internal forum organized by the Apostolic Penitentiary, 4 March 2016, in AAS, 108 (2016), 295, English translation in *Origins*, 45 (2015-2016), 774.

<sup>54</sup> FRANCIS, *Evangelii gaudium*, n. 44.

<sup>55</sup> COUNCIL OF TRENT, Session 14 on the Sacrament of Penance, 25 November 1551, Chapter 8: The Necessity and Fruit of Satisfaction, in H. DENZINGER, *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*, 43<sup>rd</sup> edition, P. HÜNERMANN (ed. original bilingual edition), R. FASTIGGI and A.E. NASH (eds. for English edition), San Francisco, Ignatius

The 1983 Code treats this obligation in canon 981. “The confessor is to impose salutary and suitable penances in accord with the quality and number of sins, taking into account the condition of the penitent. The penitent is obliged to fulfill these personally.” The *Rite of Penance* notes that “[t]he kind and extent of the expiation must be suited to the personal condition of penitents so that they may restore the order that they have upset and through the corresponding remedy be cured of the sickness from which they suffered” (n. 6c). Likewise, the rubrics of the *Rite of Penance* instruct the priest to propose “an act of penance which the penitent accepts to make satisfaction for sin and to amend his life” (n. 44).<sup>56</sup>

True conversion is “a radical reorientation of our whole life, a return, a conversion to God with all our heart, an end of sin, a turning away from evil, with repugnance toward the evil action we have committed” (CCC, n. 1431). Although penances may take various forms, the confessor must take into account the condition of the penitent. The *Catechism of the Catholic Church* states that penances make take the form of “prayer, an offering, works of mercy, service of neighbor, voluntary self-denial, sacrifices, and above all the patient acceptance of the cross we must bear” (CCC, n. 1460). The *Rite of Penance* notes that penances in the form of works of mercy and service to neighbor are especially appropriate, since “[t]hese will underline the fact that sin and its forgiveness have a social aspect” (n. 18).<sup>57</sup>

Press, 2021, no. 1692. The Council also promulgated several canons related to this issue: “Can. 12. If anyone says that the whole punishment is always remitted to God together with the guilt and that the satisfaction of penitents is nothing else but the faith by which they realize that Christ has satisfied for them, let him be anathema; Can. 13. If someone says, concerning temporal punishment, that no satisfaction is made to God through the merits of Christ by means of the punishments inflicted by him and patiently borne, or of those imposed by the priest, or finally of those voluntarily undertaken, as fasts, prayers, almsgiving, or other works of piety; and that, therefore, the best penance is merely a new life, let him be anathema; Can. 14. If anyone says that the satisfactions by which penitents atone for their sins through Christ Jesus are not worship of God but traditions of men that obscure the doctrine of grace, the true worship of God, and the benefit of Christ’s death itself, let him be anathema.” (DENZINGER, 1712-1714).

<sup>56</sup> “It is certain teaching that the penitent is bound to *accept* the reasonable penance imposed by the confessor. The obligation is serious when the penance given is grave, the material of the confession necessary, and the confessor intends to oblige seriously (which is presumed in such circumstances). The penitent can refuse an unreasonable penance or ask for another from the same or from a different confessor. The confessor should normally acquiesce in the reasonable request of a penitent.” (HALLIGAN, *The Sacraments and Their Celebration*, 112-113).

<sup>57</sup> Keifer notes that the introduction to the *Rite of Penance* “emphasizes the importance of penance as an ongoing process in the penitent’s life. Penance which can be quickly finished in church do not normally serve that purpose. Moreover, the act of penance is seen not as a kind of minimal legal requirement to satisfy sacramental validity; rather, it is part of the overall concern to lead the penitent to a fuller Christian life. The purpose of the sacrament

Commentators identify various kinds of penitents—children, habitual sinners, recidivists, pious penitents, the scrupulous, etc.—and provide strategies for addressing each. When imposing penances, confessors must be aware of the personal condition of the penitent and avoid imposing excessive burdens or indefinite penances which may be misunderstood or difficult to fulfill. The danger in imposing penances can be found in being either too harsh or too lax. There is a temptation in seeing the lax confessor as more merciful, but Pope Francis has cautioned against this on several occasions. For instance, he raised this in a 2013 interview, published in several Jesuit periodicals.

The church sometimes has locked itself up in small things, in small-minded rules. The most important thing is the first proclamation: Jesus Christ has saved you. And the ministers of the church must be ministers of mercy above all. The confessor, for example, is always in danger of being either too much of a rigorist or too lax. Neither is merciful, because neither of them really takes responsibility for the person. The rigorist washes his hands so that he leaves it to the commandment. The loose minister washes his hands by simply saying, ‘This is not a sin’ or something like that. In pastoral ministry we must accompany people, and we must heal their wounds.<sup>58</sup>

In a similar vein, in an address to the priests of the Diocese of Rome, Pope Francis warns against the dangers of laxity and rigorism in the confessional.

Let us return to the sacrament of reconciliation. It often happens that we priests hear our faithful telling us they have encountered a priest who is very “strict” or, on the contrary, very “liberal” in the confessional, i.e., one who is rigorous or one who is lax. And this is not good. It is normal that there are differences in the style of confessors, but these differences cannot concern the essential, that is, sound moral doctrine and mercy.

Neither the lax person nor the rigorist bears witness to Jesus Christ, for neither one takes care of the person he encounters. The rigorist washes his hands of them: In fact, he nails the person to the law, understood in a cold and rigid way; and the lax one also washes his hands of them: He is only apparently merciful, but in reality by minimizing the sin he does not take seriously the problems of that conscience.

True mercy takes the person into one’s care, listens to him attentively, approaches the situation with respect and truth, and accompanies him on the

is not only to comfort and console but also to encourage and strengthen: the act of penance is seen as a living out of the new life in Christ which the penitent has assumed.” (R. KEIFER and F.R. McMANUS, *The Rite of Penance Commentaries*, Volume One: *Understanding the Document*, Washington, DC, The Liturgical Conference, 1975, 15 [= KEIFER and McMANUS, *The Rite of Penance Commentaries*]).

<sup>58</sup> Antonio SPADARO, “Pope Francis’ Interview with Jesuit Magazines,” 19 September 2013, in *Origins*, 43 (2013-2014), 300.

journey of reconciliation. And this is demanding; yes, certainly. The truly merciful priest behaves like the good Samaritan. But why does he do it? Because his heart is capable of having compassion; it is the heart of Christ!<sup>59</sup>

He returned to this point and expanded upon it in an address to participants in a course organized by the Apostolic Penitentiary in 2015.

So often being merciful is confused with being a lenient confessor. But consider this: neither a lenient confessor nor a rigid confessor is merciful. Neither one. The first, because he says: “Go on, this is not a sin, go on, go!” The other, because he says: “No, the law says...” But neither of them treats the penitent as a brother, taking him by the hand and accompanying him in his conversion! One says: “Go, don’t worry, God forgives all. Go on, go!” The other says: “No, the law says no.”

The merciful one instead listens to him, forgives him, but carries his burden and accompanies him, because conversion, yes, has begun—perhaps—today, but it must continue with perseverance.... You carry his burden, as the Good Shepherd who goes in search of the lost sheep and carries it.

But it must not be confused: this is very important. Mercy means carrying the burden of a brother or sister and helping them walk. Do not say “ah, no, go on, go!”, nor be rigid. This is very important. And who can do this? The confessor who prays, the confessor who weeps, the confessor who knows that he is more a sinner than the penitent, and if he himself has never done the bad thing that the penitent speaks of, it is but for the grace of God. Merciful is being close and accompanying the process of conversion.<sup>60</sup>

Finally, in a letter to priests, Pope Francis encourages confessors to be “neither rigorous nor lax, but deeply concerned for your people and accompanying them on their journey of conversion to the new life that the Lord bestows on us all.”<sup>61</sup>

Finding the balance between laxism and rigorism in the confessional is not easy and requires a careful discernment of spirits. McManus argues that a confessor must integrate the “paternal and the fraternal dimensions of his ministry”: “It is possible to be paternal without being patronizing or authoritarian—to be paternal in the sense of displaying the Father’s mercy, as the ritual suggests. But the priest must be conscious of his own weakness; he is a brother sinner, and he should proffer counsel with humility and kindness.”<sup>62</sup>

<sup>59</sup> FRANCIS, Address to the parish priests of the Diocese of Rome, 6 March 2014, in *AAS*, 106 (2014), 186, English translation in *Origins*, 43 (2013-2014), 699.

<sup>60</sup> FRANCIS, Address to participants in a course on the internal forum organized by the Apostolic Penitentiary, 12 March 2015, in *Origins*, 44 (2014-2015), 726.

<sup>61</sup> FRANCIS, Letter to priests on the occasion of the 160<sup>th</sup> anniversary of the death of the holy Curé of Ars, 4 August 2019, in *Origins*, 49 (2019-2020), 225.

<sup>62</sup> KEIFER and MCMANUS, *The Rite of Penance Commentaries*, 40.

A confessor exercises his ministry *in nomine Ecclesiae* (cf. c. 834 § 2). The *Rite of Penance* recalls that “[i]n order that he may fulfil his ministry properly and faithfully, understand the disorders of souls and apply the appropriate remedies to them, and act as a wise judge, the confessor must acquire the needed knowledge and prudence under the guidance of the Church’s magisterium and especially by praying fervently to God” (n. 10a). In other words, a confessor must be prudent, a skill acquired from experience and fidelity to his role as both judge and physician, a minister of divine justice and mercy (c. 978 § 1), accompanying the faithful on their journey of reconciliation and conversion.<sup>63</sup>

### *Conclusion*

The confessor is both a minister of divine justice and a minister of divine mercy. As a minister of divine justice, he must pass a “sentence” of absolution or retention of sin, after hearing the penitent and discerning his proper disposition.<sup>64</sup> He must be neither overly harsh nor lax. Indeed, this prayerful encounter must take place within a “tribunal of mercy,” not a torture chamber of “strict and rigorous justice.”<sup>65</sup> The confessor stands in judgement, as minister of divine justice, but, more importantly, as a minister of mercy, an authentic sign of the Father’s merciful gaze. The confessor’s availability, counsel, and imposition of penances should always reflect the example of “the Good Shepherd who seeks the lost sheep; of the Good Samaritan who binds up wounds; of the Father who awaits the prodigal son and welcomes

<sup>63</sup> On this point, McManus states: “The prudence that is sought in the minister is very largely that of distinguishing penitent from penitent—recognizing the vast diversity of moral capacity, commitment to the Lord, response to God’s gifts, intellectual background, psychological sensitivity. Most priests have the good sense, acquired from experience if not theoretical study, not to make demands beyond the abilities or comprehension of penitents. They have learned how to combine warmth and generosity with clarity and firmness, how to lead penitents to judge themselves, how to turn psychological guilt into genuine sorrow and sense of responsibility, when to speak and when to remain silent.” (Ibid.).

<sup>64</sup> DAVIS, *Moral and Pastoral Theology*, 271.

<sup>65</sup> John Paul II recalls this judicial function in *Reconciliatio et paenitentia*, n. 31: “According to the most ancient traditional idea, the sacrament is a kind of judicial action; but this takes place before a tribunal of mercy rather than of strict and rigorous justice, which is comparable to human tribunals only by analogy namely insofar as sinners reveal their sins and their condition as creatures subject to sin; they commit themselves to renouncing and combating sin; accept the punishment (sacramental penance) which the confessor imposes on them and receive absolution from him.”

him on his return; and of the just and impartial judge whose judgement is both just and merciful.”<sup>66</sup>

At the close of the Jubilee Year of Mercy, in *Misericordia et misera*, Pope Francis extended an invitation to all priests to prepare themselves for this important ministry. In so doing, he reveals the qualities he would like confessors to emulate.

I thank all of you from the heart for your ministry, and I ask you to be *welcoming* to all, *witnesses* of fatherly tenderness whatever the gravity of the sin involved, *attentive* in helping penitents to reflect on the wrong they have done, *clear* in presenting moral principles, *willing* to walk patiently beside the faithful on their penitential journey, *far-sighted* in discerning individual cases and *generous* in dispensing God’s forgiveness. Just as Jesus chose to remain silent in order to save the woman caught in adultery from the sentence of death, so every priest in the confessional should be open-hearted, since every penitent is a reminder that he himself is a sinner, but also a minister of mercy.<sup>67</sup>

Initial and ongoing formation for confessors is critical, particularly in a context in which fewer members of the faithful avail themselves of the sacrament with any degree of regularity. Attentive to their role as both ministers of divine justice and mercy, may confessors serve as effective “instruments of reconciliation,”<sup>68</sup> thereby allowing the Sacrament of Penance to once again “regain its central place in the Christian life.”<sup>69</sup>

<sup>66</sup> CCC, n. 1465. John Paul II likewise states: “Just as at the altar where he celebrates the Eucharist and just as in each one of the sacraments, so the priest, as the minister of Penance, acts ‘in persona Christi.’ The Christ whom he makes present and who accomplishes the mystery of the forgiveness of sins is the Christ who appears as the brother of man, the merciful high priest, faithful and compassionate, the shepherd intent on finding the lost sheep, the physician who heals and comforts, the one master who teaches the truth and reveals the ways of God, the judge of the living and the dead, who judges according to the truth and not according to appearances.” (*Reconciliatio et paenitentia*, n. 29).

<sup>67</sup> FRANCIS, *Misericordia et misera*, n. 10.

<sup>68</sup> Pope Francis describes the “instrumentality” of a confessor’s ministry in a 2018 address to the Apostolic Penitentiary: “First and foremost I would say that it is always necessary to rediscover, as Saint Thomas Aquinas states, the *instrumental dimension* of our ministry. The confessor priest is neither the source of Mercy nor of Grace; he is certainly an indispensable instrument of them, but always only an instrument! [...] Remembering that you are, and must be, only instruments of Reconciliation is the first requirement for assuming an attitude of humble listening to the Holy Spirit, who guarantees a sincere effort of discernment. Being instruments is not diminishing the ministry but, on the contrary, is its complete fulfilment. Being instruments in the measure in which the priest disappears and Christ the supreme and eternal Priest appears, our vocation of being ‘unworthy servants’ is fulfilled.” (FRANCIS, Address to participants of the course organized by the Apostolic Penitentiary, 9 March 2018, in *Origins*, 48 [2018-2019], 15).

<sup>69</sup> FRANCIS, *Misericordia et misera*, n. 11.

## LEGISLATIVE ACTS AND DOCUMENT FORMS OF THE APOSTOLIC SEE

JOHN M. HUELS

**SUMMARY** — The Apostolic See principally employs four document forms for its legislation: the Apostolic Constitution, the Apostolic Letter given *motu proprio*, the Rescript *ex audientia Sanctissimi*, and the General Decree. This study explores the characteristics of each of these document forms, exemplifying them with the legislative acts promulgated in the pontificate of Benedict XVI and comparing their number to those of Pope Francis in the same period of time. The study shows that no document form is used exclusively for legislation but also may at times be doctrinal or administrative, so it often falls to a competent canonist to determine the precise nature and weight of a document of the Apostolic See.

**RÉSUMÉ** — Le Siècle apostolique emploie principalement quatre formes de documents pour sa législation: la Constitution apostolique, la Lettre apostolique *motu proprio*, le Rescrit *ex audientia Sanctissimi* et le décret général. Cette étude explore les caractéristiques de chacune de ces formes de documents, en les illustrant avec les actes législatifs promulgués dans le pontificat de Benoît XVI et en comparant leur nombre à ceux du pape François à la même période. L'étude montre qu'aucune forme de document n'est utilisée exclusivement pour la législation mais peut aussi parfois être doctrinale ou administrative, de sorte qu'il incombe souvent à un canoniste compétent de déterminer la nature précise et le poids d'un document du Siècle apostolique.

### *Introduction*

The Apostolic See employs a variety of document forms for various kinds of acts: magisterial, juridical, pastoral, etc.<sup>1</sup> This study considers the several kinds

<sup>1</sup> Early in his career, Francis MORRISSEY authored a pamphlet on document forms used by the pope and Roman Curia: *The Canonical Significance of Papal and Curial Pronouncements*, Hartford, CT, CLSA, 1974. He updated it in 1990: "Papal and Curial Pronouncements: Their



of documents regularly used for a legislative act and what the document form indicates about the significance of the act. The focus is on the practice of the Holy See during the nearly eight-year pontificate of Benedict XVI (19 April 2005 to 28 February 2013), which is the most recent pontificate to have been completed at the time of this writing. As well, we shall note the extent of the same legislative activity during the same eight-year period in the pontificate of Francis.

The study has four parts, each devoted to one of the four most important document forms used for ecclesiastical legislation: the Apostolic Constitution, the Apostolic Letter given *motu proprio*, the Rescript *ex audientia Sanctissimi*, and the General Decree. The Conclusion compares the use of these documents in Benedict's papacy with their frequency during Francis's pontificate for exactly the same length of time.<sup>2</sup> The Chirograph and the Bull are not included in the survey, as these rare documents are seldom used for a legislative act.<sup>3</sup>

The study is concerned with legislative *acts*, not just laws. Laws (*leges*) are the products of legislative acts, but they are not the only ones. A legislative act may approve a custom, giving the custom the *vis legis* (c. 26); it may

Canonical Significance in Light of the 1983 Code of Canon Law," in *Jur*, 50 (1990), 102-125; and this was reprinted in pamphlet form, first in French translation (*Les documents pontificaux et de la Curie: leur portée canonique à la lumière du "Code de droit canonique" de 1983*, traduction établie par Marie-Paule Couturier, Ottawa, Faculté de droit canonique, Université Saint-Paul, 1992); and then in a revised English version (*Papal and Curial Pronouncements: Their Canonical Significance in Light of the Code of Canon Law*, 2<sup>nd</sup> ed. rev. and updated by Michel THÉRIAULT, Ottawa, Faculty of Canon Law, Saint Paul University, 1995).

<sup>2</sup> On 23 January 2021, the duration of Francis's papacy reached the same number of days as the entirety of Benedict's (2873 days). To enable a meaningful comparison, no documents of Francis's papacy are considered that were published after this date.

<sup>3</sup> There were no Bulls used for legislation during the pontificate of Benedict XVI. A Chirograph was used in 2007 to establish the Vatican's Agency for the Evaluation and Promotion of Quality in Ecclesiastical Universities and Faculties (AVEPRO), but it was not published. Reference to it is made later during the papacy of Francis. See SECRETARIAT OF STATE, Statutes of the Agency for the Evaluation and Promotion of Quality in Ecclesiastical Universities and Faculties (AVEPRO), 5 May 2015, in AAS, 109 (2017), 296-302.

A Chirograph was used by Benedict in 2011 to reconstitute the public association of the faithful known as Aid to the Church in Need (*Opus Auxilium patienti Ecclesiae*), which had been connected with the Norbertine Abbey of Tongerlo in Belgium. Benedict relocated it to Vatican City, granting it Vatican juridical personality, both canonical and civil. The pope also approved the association's statutes, which are appended to the Chirograph. BENEDICT XVI, Chirograph *Auxilium patienti Ecclesiae*, 4 November 2011, in AAS, 103 (2011), 790-807.

Pope Francis has employed these rarer forms more frequently, issuing four legislative Chirographs and one Bull. Some oddities in his papacy include the publication of (legislative) statutes without any document of promulgation (five times), using an Apostolic Letter (not *motu proprio*) for a change in law, and issuing a Rescript issued in the pope's own name (not *ex audientia*). For citations see [www.vatican.va](http://www.vatican.va) and the study by William Daniel, which is referenced in the following footnote.

authentically interpret the law *per modum legis* (c. 16 §2); and it may establish and promulgate statutes *vi potestatis legislativae* (c. 94 §3). Moreover, in the canonical system, the products of legislative acts are not solely confined to norms that regulate Church order, which are products of the *munus regendi*. Certain matters, encompassing the other *munera* of teaching and sanctifying, may also be promulgated by a legislative act.<sup>4</sup> Thus, for example, an Apostolic Constitution may promulgate a new Catechism;<sup>5</sup> or a legislative document may promulgate a revised Profession of Faith—both pertaining to the *munus docendi*. Likewise, a General Decree may promulgate a revised liturgical rite or establish a new indulgence—both pertaining to the *munus sanctificandi*.<sup>6</sup>

Most legislative acts of the Apostolic See are placed by the pope himself.<sup>7</sup> The Supreme Pontiff regularly exercises ordinary legislative power both by acts issued in his own name or by approving a text in an audience which is then promulgated by the Secretariat of State or another dicastery. At times, the pope delegates his legislative power to the Secretariat of State or a dicastery, which then places the legislative act in its own name. In addition, the Apostolic Penitentiary has ordinary legislative power for establishing and using indulgences.<sup>8</sup> The Pontifical Council for Legislative Texts (PCLT) has ordinary power to issue authentic interpretations of law (*PB* 155), which are legislative acts having the force of law (c. 16 §§ 1, 2), although no authentic interpretation of universal

<sup>4</sup> William Daniel states that the specific object of a legislative act “can vary widely according to the constitution and needs of the community.” See DANIEL, “Interlocutory Observations on Legislative Technique in the Pontificate of Pope Francis (March 2013–October 2020),” in *CLSAP*, 82 (2020), 21–57. Elsewhere, he discusses the essential characteristics of legislative norms: imperativeness, generality, abstractness, certitude, stability, exteriority, and rationality. IDEM, *The Art of Good Governance: A Guide to the Administrative Procedure for Just Decision-Making in the Catholic Church*, Montreal, Wilson & Lafleur, 2015, 14–15. Hervada and Lombardía also evince a broad understanding of law in saying that “law is not a simple ordering of behavior. It is also a structure of societies and communities.... Law orders—it structures and organizes—a social group by creating bonds, establishing juridical situations, delimiting areas of jurisdiction and independence, granting powers and rights, etc.” Canon law is no exception; it “is a structure of the Church and not merely a norm for acting.” See Javier HERVADA and Pedro LOMBARDÍA, “Introduction to Canon Law,” in *Exegetical Comm*, vol. 1, 10 (= HERVADA and LOMBARDÍA, in *Exegetical Comm*).

<sup>5</sup> JOHN PAUL II, Apostolic Constitution *Fidei depositum*, 11 October 1992, in *AAS*, 86 (1994), 113–118.

<sup>6</sup> In canon 76 § 1, one sees the extremely rare case of the law reserving to a legislator an act of executive power (the grant of a privilege). Here, the legislator functions in virtue of his “office” as legislator, not because legislative power is necessary for the act.

<sup>7</sup> The “placing” of a juridical act has an odd ring to it in English. It is a technical term in canon law, a literal translation of the Latin *ponere* (cf. cc. 124 ff.), which is translated also as “to perform.”

<sup>8</sup> See the discussion below in Section 4.4.

law was promulgated during Benedict's papacy;<sup>9</sup> there was only one during the comparable eight-year period under Francis (on c. 1041, nn. 4-5).<sup>10</sup>

Our interest is only with *ecclesiastical* legislative acts, not with the civil laws of the pope, called by the Italian word for laws (*leggi*). The pope regularly enacts civil laws in his capacity as the supreme authority for the governance of Vatican City. Ecclesiastical laws, unlike the Vatican civil laws, are never promulgated in a document called *lex* or *legge*.

Our concern is also not with the various document forms used by dicasteries of the Roman Curia that are not legislative (the Instruction, Circular Letter, Directory, etc.). These documents typically contain general administrative norms, which are juridical norms like laws, but they are the product of an act of executive power. As such, they are inferior to laws and null if contrary to law (cc. 31-34). The pope himself, being the supreme legislator, does not issue general administrative norms, although he regularly uses executive power in issuing singular administrative acts for a variety of purposes, as exemplified below.

## 1 — *The Apostolic Constitution*

The Apostolic Constitution is a solemn papal document used for various purposes. Pope Benedict issued 125 Apostolic Constitutions, but only one of them is legislative. The others are singular administrative decrees (the “provisions” of canon 48). The most common use of the Apostolic Constitution is to decree the erection or modification of dioceses and other particular Churches. The Apostolic Constitution may also be used for a solemn doctrinal declaration, but Benedict made no use of the document form for this purpose. Some Apostolic Constitutions are primarily legislative, used for a substantial innovation in or reform of universal law. Generally, such legislative constitutions also include a theological introduction which serves to underpin the doctrinal foundations of the new legislation.

The sole legislative Apostolic Constitution of Pope Benedict is *Anglicanorum coetibus* of 2009.<sup>11</sup> It establishes the fundamental structures and

<sup>9</sup> In any case, the form used for authentic interpretations is unique for a legislative act. It is presented as a response to a doubt (*dubium* and *responsio*), akin to the doctrinal responses of the Congregation for the Doctrine of the Faith.

<sup>10</sup> PCLT, Response, 15 September 2016, in AAS, 108 (2016), 707.

<sup>11</sup> *Anglicanorum coetibus* (AC), 4 November 2009, in AAS, 101 (2009), 985-990. The Pope concludes *Anglicanorum coetibus* by declaring: “We desire that our dispositions and norms be firm and efficacious both now, and in the future, notwithstanding, should it be necessary, the Apostolic Constitutions and ordinances issued by our predecessors, or any other

regulations for Anglicans to be received into the full communion of the Catholic Church while retaining their own clergy, members of religious institutes, and lay faithful as well as their own liturgical rites, parishes, and internal governance structures. There are many innovations in this legislation, the most important being the creation of the personal ordinariate for former Anglicans who become Roman Catholics, a structure akin to a personal diocese. Any personal ordinariate for Anglicans entering into full communion with the Catholic Church is erected by the Congregation for the Doctrine of the Faith (CDF) within the boundaries of a conference of bishops after consultation with the conference (AC no. I § 1).

At the same time that *Anglicanorum coetibus* was promulgated, the CDF published a text of “Complementary Norms.”<sup>12</sup> These are general administrative norms of executive power. They received the pope’s approval *in forma communi*, not his approval *in forma specifica*. A new paragraph to the text was added early in the pontificate of Francis to allow these personal ordinariates to participate more fully in the work of the New Evangelization.<sup>13</sup>

## 2 — *The Apostolic Letter motu proprio*

During the course of his eight-year pontificate, Benedict XVI issued nineteen Apostolic Letters *motu proprio*.<sup>14</sup> One of these *motu proprios*

prescriptions, even those requiring special mention or derogation.” This solemn revoking formula implicitly revokes any ecclesiastical laws contrary to a norm of the Apostolic Constitution, including contrary particular laws and customs (cf. cc. 20, 28). No special effective date is specified, so the usual norm of canon 8 § 1 obtains, namely, that it becomes effective after three months from the date of the issue of the AAS in which it was promulgated, that is, three months from 4 December 2009.

<sup>12</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Complementary Norms*, 4 November 2009, in AAS, 101 (2009), 991-996.

<sup>13</sup> 31 May 2013, in EV 29:452. The new art. 5 § 2 reads: “A person who has been baptized in the Catholic Church but who has not completed the sacraments of initiation, and subsequently returns to the faith and practice of the Church as a result of the evangelizing mission of the Ordinariate, may be admitted to membership in the Ordinariate and receive the sacrament of confirmation or the sacrament of the Eucharist or both.”

<sup>14</sup> The Latin *motu proprio*, which means “on his [the pope’s] own initiative,” is italicized when used in its grammatically proper context, namely, when it modifies “Apostolic Letter.” When it is adopted as an English word and stands alone to refer to the document, it is not italicized (singular noun = *motu proprio*; plural = *motu proprios*).

A quite different document form is the “Apostolic Letter” without the qualifier *motu proprio*. This form is not used for legislation but is typically an act of the ordinary papal magisterium,

promulgates civil laws (*leggi*) for Vatican City,<sup>15</sup> which is not the concern of this study. We shall survey the other eighteen, categorized according to the physical and juridical persons and other entities for whom they were issued (*omnes pro quibus latae sunt*, c. 12 § 1). The first five to be treated were issued for the faithful in general, dealing with a compendium to the Catechism, the extraordinary form of the Roman Rite, certain derogations from the Code of Canon Law, a holy year, and forms of charitable service. These are followed by thirteen *motu proprio*s governing particular entities: the Consistory of Cardinals, various dicasteries of the Holy See, and two basilicas—St. Paul Outside-the-Walls and St. Anthony of Padua.

## 2.1 — Compendium to the Catechism

The Apostolic Letter *motu proprio* is chiefly used to promulgate ecclesiastical laws, but Pope Benedict's first *motu proprio* approves and promulgates a compendium to the Catechism,<sup>16</sup> which is a product of the *munus docendi*. The *Compendium to the Catechism of the Catholic Church* is a teaching document, not law, but the *motu proprio* itself is legislative in that it promulgates this compendium and declares the supreme authority's approval of its use by the faithful.

## 2.2 — The Extraordinary Form of the Roman Rite

Commonly called by its incipit, *Summorum Pontificum*, this *motu proprio* was the first major legislative innovation of Pope Benedict.<sup>17</sup> In the document, Benedict distinguishes between the “ordinary form” of the Roman Rite, which consists of the post-conciliar rites promulgated by Pope Paul VI, and the “extraordinary form,” which is comprised of the earlier liturgical rites, chiefly the *Missale Romanum* and *Breviarum Romanum* promulgated by John XXIII in 1962. The *motu proprio* treats related matters in twelve articles. Importantly, *Summorum Pontificum* allows priests to celebrate Mass and the Divine Office according to the extraordinary form without the

or it has a pastoral purpose. An example is Benedict's 2009 Apostolic Letter to the priests of the Catholic Church, *Nella prossima solennità*, 16 June 2009, in AAS, 101 (2009), 569-579.

<sup>15</sup> Apostolic Letter m.p. *Per procedere ulteriormente*, 1 October 2008, in *OR*, 31 December 2008, 7; AAS, Supp. 79 (2008), 65-70.

<sup>16</sup> BENEDICT XVI, Apostolic Letter m.p. *Vent'anni or sono*, 28 June 2005, in AAS, 97 (2005), 801-802.

<sup>17</sup> BENEDICT XVI, Apostolic Letter m.p. *Summorum Pontificum*, 7 July 2007, in AAS, 99 (2007), 777-781.

permission of ecclesiastical authority, abrogating previous legislation which had required this.<sup>18</sup> In addition, the pastor (*parochus*) has authority to permit the use of the extraordinary form of the *Rituale Romanum* for baptism, marriage, penance, and the anointing of the sick (art. 9 § 1) and to allow the celebration of Mass according to the extraordinary form for marriages, funerals, and special occasions (art. 5 § 3).

In art. 1, *Summorum Pontificum* explicitly obrogates<sup>19</sup> the conditions established by John Paul II for the use of the former liturgy by substituting them with the new norms that follow in arts. 2-12 (*condiciones ... substituuntur ut sequitur*). The new legislation had an effective date of 14 September 2007. It appeared in an issue of the AAS dated 7 September 2007, but that issue was not actually published until several months later, and certain changes in the text were introduced at that time.<sup>20</sup> Curiously, the law had taken effect before the final version with these changes had been published, but this has no practical consequences, as none of the changes is for validity.<sup>21</sup>

### 2.3 — Changes in the Code on Sacraments

The 2009 *motu proprio Omnim in mentem* derogates from two canons of the Latin Code on holy orders (cc. 1008 and 1009 § 3) and three canons on marriage (cc. 1117, 1086 § 1, and 1124).<sup>22</sup> The newly worded canons, or paragraphs of same, are as follows.

Canon 1008. By divine institution some among Christ's faithful are, through the sacrament of holy orders, marked with an indelible character and are thus constituted sacred ministers; thereby they are consecrated and deputed so

<sup>18</sup> JOHN PAUL II, Apostolic Letter m.p. *Ecclesia Dei*, 2 July 1988, in AAS, 80 (1988), 1495-1498; CONGREGATION FOR DIVINE WORSHIP, Circular Letter on the use of the 1962 Roman Missal *Quattuor abhinc annos*, 3 October 1984, in *Comm*, 17 (1985), 3-4. This Circular Letter was the means of promulgating a legislative act of the pope, namely, a faculty allowing diocesan bishops to permit priests to celebrate Mass according to the 1962 *Missale Romanum*. On this point, see Chad J. GLENDINNING, *Summorum Pontificum* and the Use of the Extraordinary Form of the Roman Rite: A Canonical Analysis in Light of the Current Liturgical Law, PhD/JCD Thesis, Ottawa, Saint Paul University, 2010, 209-210.

<sup>19</sup> The notion of "obrogation" used in this study and elsewhere in canonical doctrine means *the revocation of a prior law by its substitution with a new law*. Typically, this does not involve the change of the paragraph or article number of the document of which the new law is a part.

<sup>20</sup> For these changes, see the footnotes in *EV*, vol. 24, 758-761.

<sup>21</sup> Effectively, the changes could not have had effect until they were published and capable of being known.

<sup>22</sup> BENEDICT XVI, Apostolic Letter m.p. *Omnium in mentem*, 26 October 2009, in AAS, 102 (2010), 8-10.

that, each according to his own position, may be devoted to the People of God under a new and particular title.

Canon 1009 §3. Those who are ordained in the episcopate or presbyterate receive the mission and faculty of acting in the person of Christ the Head. Deacons, however, receive the power of serving the People of God in the ministry of the liturgy, the word, and charity.

Canon 1086 §1. A marriage is invalid when one of the two persons was baptized in the Catholic Church or received into it, and the other was not baptized.

Canon 1117. The form prescribed above is to be observed if at least one of the parties contracting marriage was baptized in the Catholic Church or received into it, without prejudice to the provisions of c. 1127 §2.

Canon 1124. Without the express permission of the competent authority, marriage is prohibited between two baptized persons, one of whom was baptized in the Catholic Church or received into it after baptism, the other of whom belongs to a Church or ecclesial community not in full communion with the Catholic Church.

Regarding holy orders, the principal change is theological in nature, clarifying that deacons, unlike bishops and presbyters, do not act in the person of Christ the Head (*in persona Christi Capitis*). Regarding marriage, the *motu proprio* abrogates the exemptions for Catholics, who had defected from the Church by a formal act, from the laws on the impediment of disparity of cult, on canonical form, and on mixed marriage.

## 2.4 — The Year of Faith

The heart of the *motu proprio Porta fidei* is Pope Benedict's statement: "We have decided that a Year of Faith should be announced" (*statuimus ut Annus fidei indiceretur*). He continues: "It will begin on 11 October 2012, the fiftieth anniversary of the opening of the Second Vatican Council, and it will end on the Solemnity of Our Lord Jesus Christ, Universal King, on 24 November 2013."<sup>23</sup> Clearly, no law is established. The aims of a Year of Faith pertain to the Church's *munus sanctificandi*, not the *munus regendi*. Yet, the *motu proprio* itself is a legislative act. The Year of Faith offers the faithful a structured period of time with organized opportunities for intensifying their appreciation for their Christian faith and growing in their life of faith; the *motu proprio* is the legislative mechanism for inaugurating and encouraging these essentially spiritual endeavors.

<sup>23</sup> BENEDICT XVI, Apostolic Letter m.p. *Porta fidei*, 11 October 2011, in AAS, 103 (2011), 723-734.

## 2.5 — The Service of Charity

A 2012 *motu proprio*, *Intima Ecclesiae natura*, is meant “to provide an organic legislative framework for the better overall ordering of the various organized ecclesial forms of the service of charity.”<sup>24</sup> It is directed chiefly to Catholic associations and foundations involved in charitable work done in the name of the Church and/or entailing the use of donations of the faithful. Such associations and foundations, be they juridical persons or not, must have statutes approved by the competent ecclesiastical authority (art. 1). The extensive inclusion, within the scope of this legislation, of private associations (c. 321) and foundations (c. 1303) that are not juridical persons is contrary to the Code. This is an example of the derogation of prior universal law by a contrary provision of later universal law (cf. c. 20).

The *motu proprio* has fifteen articles, most of which are applications to Catholic charitable agencies of existing canonical norms and principles. Two new canonical obligations are imposed. (1) The diocesan bishop and pastor (*parochus*) have the duty (*officium*) “to prevent publicity being given through parish or diocesan structures to initiatives which, while presenting themselves as charitable, propose choices or methods at odds with the Church’s teaching.” The diocesan bishop, moreover, “is to ensure that charitable agencies dependent upon him do not receive financial support from groups or institutions that pursue ends contrary to the Church’s teaching” and that they “do not accept contributions for initiatives whose ends, or the means used to pursue them, are not in conformity with the Church’s teaching” (art. 9 § 3). Although there is no mention of the eparchial bishop, the *motu proprio* also binds the Eastern Catholic Churches, as is evident from its numerous citations of the Eastern Code.

## 2.6 — Changes in Law on Papal Elections

The 2007 *motu proprio* *Constitutione apostolica*<sup>25</sup> abrogates no. 75 of John Paul II’s 1996 Apostolic Constitution *Universi dominici gregis*.<sup>26</sup> This

<sup>24</sup> BENEDICT XVI, Apostolic Letter m.p. *Intima Ecclesiae natura*, 11 November 2012, in AAS, 104 (2012), 996-1004.

<sup>25</sup> BENEDICT XVI, Apostolic Letter m.p. *Constitutione apostolica*, 11 June 2007, in AAS, 99 (2007), 776-777.

<sup>26</sup> JOHN PAUL II, Apostolic Constitution *Universi dominici gregis*, 22 February 1996, in AAS, 88 (1996), 305-343. No. 74 states: “In the event that the Cardinal electors find it difficult to agree on the person to be elected, after balloting has been carried out for three days in the form described above (in nos. 62 ff) without result, voting is to be suspended for a maximum of one day in order to allow a pause for prayer, informal discussion among the voters, and a brief



earlier provision had allowed for the election of a pope by an absolute majority (more than fifty per cent of the votes) when, after repeated ballots over several days as specified in no. 74, the cardinals are unable to reach the qualified majority of at least two-thirds of the votes. This legislation of Benedict revokes that innovation and restores the traditional requirement of a minimally two-thirds majority of the votes for the validity of the election.<sup>27</sup>

The *motu proprio* explicitly abrogates no. 75 of *Universi dominici gregis* and replaces it with a new norm, yet it also employs the standard general revoking formula, *contrariis quibusvis non obstantibus*. It is difficult to imagine why this revoking formula is at all necessary, given the explicit abrogation. Its usage here, as in so many other Roman documents, seems merely a convention without juridical significance.

## 2.7 — Additional Changes on Papal Elections

The 2013 *motu proprio*, *Normas nonnullas*,<sup>28</sup> explicitly obrogates certain norms of *Universi Dominici gregis* on the election of the Roman Pontiff, as evidenced in this statement of the legislator: “I hereby establish and decree that several norms of the Apostolic Constitution *Universi Dominici gregis* as well as the changes which I myself introduced in the aforementioned Apostolic Letter [section 2.6 above], are to be replaced (*substituantur*) by the following norms.”<sup>29</sup> The substantive changes include the following. (1) If all the Cardinal electors have assembled in Rome, the College of Cardinals may advance the election before fifteen days have elapsed (no. 37). (2) A *latae sententiae* excommunication is specified as the penalty for violating the oath of secrecy (nos. 48 and 55 § 3); the previous law had only mentioned a generic *ferendae sententiae* penalty in accord with canon 1399. The requirement of a qualified majority (at least two-thirds) for election remains unchanged.

spiritual exhortation given by the senior Cardinal in the Order of Deacons. Voting is then resumed in the usual manner, and after seven ballots, if the election has not taken place, there is another pause for prayer, discussion, and an exhortation given by the senior Cardinal in the Order of Priests. Another series of seven ballots is then held and, if there has still been no election, this is followed by a further pause for prayer, discussion, and an exhortation given by the senior Cardinal in the Order of Bishops. Voting is then resumed in the usual manner and, unless the election occurs, it is to continue for seven ballots.”

<sup>27</sup> In such a situation, only the two who had the most votes on the previous ballot enjoy passive voice, and they lose active voice.

<sup>28</sup> BENEDICT XVI, Apostolic Letter m.p. *Normas nonnullas*, 22 February 2013, in AAS, 105 (2013), 253-257.

<sup>29</sup> Emphasis mine. The obrogated norms are arts. 35, 37, 43, 46 § 1, 47, 48, 49, 50, 51 § 2, 55 § 3, 62, 64, 70 § 2, 75, and 87.

## 2.8 — Laws Affecting the Roman Curia

The 2010 *motu proprio*, *La Sede Apostolica*,<sup>30</sup> which is ecclesiastical legislation, is intimately connected with new civil legislation promulgated the same day. On 10 December 2010, Benedict issued civil laws for Vatican City in execution of the Monetary Agreement between the Vatican City State and the European Union of 17 September 2009. These civil laws (*leggi*) deal with the prevention of money laundering and the financing of terrorism, the prevention of fraud and counterfeiting, and various matters regarding euro banknotes and coins.<sup>31</sup> The present *motu proprio* makes the first of these three texts of civil law also Church law. It is a kind of “canonization” of the civil law, not just by remitting a matter to the civil law (cf. c. 22, *CCEO*, c. 1504), but by actually adopting the same matter in canon law. Benedict decrees: “I establish that the above-mentioned Law of Vatican City State and its future modifications apply as well to the Dicasteries of the Roman Curia and for each and every dependent institution or entity in which they carry out their activities, in accordance with Art. 2 of the same Law.”

In this same document, the pope establishes the *Autorità di Informazione Finanziaria* as an institution connected with the Holy See (cf. *PB* 186, 190-191); and he approves its statutes, which are attached to the *motu proprio*.<sup>32</sup> This is an example of the approval of statutes by a legislative act in accord with the third paragraph of canon 94. At the end of the *motu proprio*, the pope orders its publication in the *AAS* with no effective date specified, so the norm of canon 8 § 1 is observed, namely, three months from the date of the issue of the *AAS* in which the *motu proprio* is published, that is, three months from 7 January 2011. A rather solemn general revoking formula is used by the legislator: “I stipulate that what has been established have full and permanent value from this day forth, anything to the contrary notwithstanding, even worthy of special mention.” This formula not only revokes contrary universal laws but, by adding the phrase “even worthy of special mention,” it also implicitly revokes contrary particular law and special law (cf. c. 20).<sup>33</sup>

<sup>30</sup> BENEDICT XVI, Apostolic Letter m.p. *La Sede Apostolica*, 30 December 2010, in *AAS*, 103 (2011), 7-8.

<sup>31</sup> *EV*, vol. 26, 1982-1984.

<sup>32</sup> Statuto dell'autorità di informazione finanziaria (AIF), in *AAS*, 103 (2011), 9-13.

<sup>33</sup> On the difficult notion of *ius speciale* in canon 20, see Javier OTADUY, in *Exegetical Comm*, vol. 1, 372-373.

## 2.9 — Modifications to the Commission *Ecclesiae Dei*

The 2009 motu proprio *Ecclesiae unitatem*<sup>34</sup> derogates from previous legislation. In 1988, John Paul had established the Pontifical Commission *Ecclesiae Dei* with the aim of facilitating the full communion of groups and individual priests and religious who had adhered to the schismatic Society of St. Pius X founded by Archbishop Marcel Lefebvre.<sup>35</sup> The principal change in Benedict's legislation is to place the *Ecclesia Dei* Commission under the auspices of the Congregation for the Doctrine of the Faith, with the prefect of said Congregation serving as the president of the Commission. The pope maintains that the chief reasons for the persistence of the schism are doctrinal; thus, it follows that the doctrinal congregation should be in control of official attempts at reconciliation. The motu proprio also announces an act of papal executive power: the remission of the *latae sententiae* excommunication incurred by the four bishops who had been illicitly ordained by Lefebvre. This remission was done to encourage reconciliation, but it did not change the canonical or doctrinal status quo, as the pope clearly states: "... the remission of the excommunication was a measure taken in the context of ecclesiastical discipline to free the individuals from the burden of conscience constituted by the most serious of ecclesiastical penalties. However, the doctrinal questions obviously remain and until they are clarified the Society has no canonical status in the Church and its ministers cannot legitimately exercise any ministry" (no. 4).

In 2019, Pope Francis suppressed the Pontifical Commission *Ecclesia Dei* and transferred its competencies to the CDF.<sup>36</sup> There has been no change in the juridical status of the clergy who adhere to the Society of St. Pius X, which remains in schism.<sup>37</sup>

## 2.10 — Statutes of the Office of the Work of the Apostolic See

This motu proprio promulgates statutes for the Ufficio del Lavoro della Sede Apostolica. Promulgation in this fashion gives these statutes the force of law (c. 94 § 3). The pope ordered their publication in the AAS with an

<sup>34</sup> BENEDICT XVI, Apostolic Letter m.p. *Ecclesiae unitatem*, 2 July 2009, in AAS, 101 (2009), 710-711.

<sup>35</sup> JOHN PAUL II, Apostolic Letter m.p. *Ecclesiae Dei*, 2 July 1988, in AAS, 80 (1988), 1498.

<sup>36</sup> FRANCIS, Apostolic Letter m.p. *Da oltre*, 17 January 2019, in *Comm*, 51 (2019) 12-14.

<sup>37</sup> See Chad J. GLENDINNING, "The Priestly Society of St. Pius X: The Past, Present, and Possibilities for the Future," in *StC*, 48 (2014), 331-372.

effective date of 1 January 2010.<sup>38</sup> The revoking formula is “notwithstanding any contrary disposition, even if worthy of special mention” (*nonostante qualsiasi disposizione contraria, pur meritevole di speciale menzione*).

## 2.11 — Transfer of Curial Competencies

The 2011 motu proprio *Quaerit semper* creates a new office attached to the Roman Rota for processes of dispensation from ratified and non-consummated marriage and for cases concerning the nullity of sacred ordination, matters that heretofore had been the competence of the Congregation for Divine Worship and the Discipline of the Sacraments (CDWDS).<sup>39</sup> The legislation explicitly abrogates articles 67 and 68 of *Pastor bonus* and explicitly obrogates article 126: “Articulus 126 eiusdem Constitutionis apostolicae *Pastor bonus* ad subsequentem textum mutatur.” The motu proprio was promulgated in *l'Osservatore romano* with the effective date of 1 October 2011. As of that date, all such cases still pending at the CDWDS had to be transferred to the new office of the Rota.

## 2.12 — Merger of Two Dicasteries

The 2012 motu proprio *Pulchritudinis fidei*,<sup>40</sup> published only in Latin,<sup>41</sup> merges the Pontifical Commission for the Cultural Heritage of the Church with the Pontifical Council for Culture. A merger is the extinction of one institution by its incorporation into another. Although the word “merger” (*fusio*) is not used in the motu proprio, that is what occurred when the pope decrees his decision to join (*coniungere decrevimus*) the Commission with the Council. The former ceases to exist and its operations are taken over by the latter.

The Pontifical Commission for the Cultural Heritage of the Church was established in 1993 by Pope John Paul II's motu proprio *Inde a pontificatus*.<sup>42</sup> He made it an autonomous dicastery, separate from the Congregation

<sup>38</sup> BENEDICT XVI, Apostolic Letter m.p. *Venti anni or sono*, 7 July 2009, in AAS, 101 (2009), 712-716.

<sup>39</sup> BENEDICT XVI, Apostolic Letter m.p. *Quaerit semper*, 30 August 2011, in AAS, 103 (2011), 569-571.

<sup>40</sup> BENEDICT XVI, Apostolic Letter m.p. *Pulchritudinis fidei*, 30 July 2012, AAS, 104 (2012), 631-632.

<sup>41</sup> An Italian translation is available in *EV*, vol. 28, 722-725.

<sup>42</sup> JOHN PAUL II, Apostolic Letter m.p. *Inde a pontificatus*, 25 March 1993, in AAS, (1993), 549-552.

for the Clergy to which had been attached the Commission's predecessor, the Pontifical Commission for Preserving the Patrimony of Art and History (PB 99-104). Though autonomous, it had close ties to the Pontifical Council for Culture.

In this 2012 *motu proprio*, Benedict says that he is “derogating from the dispositions of the *motu proprio Inde a pontificatus*.” This means that the 1993 legislation of John Paul II is still in force, apart from anything in it that is changed by Benedict. This is acknowledged at the end of the *motu proprio* when Benedict says that the purposes and faculties of the Commission in *Pastor bonus* articles 99-103 and in *Inde a pontificatus* are transferred to the Pontifical Council for Culture. *Inde a pontificatus* itself had left intact articles 99-103. Thus, one must look to the prior legislation of both the 1993 *motu proprio* and *Pastor bonus* to discover the competencies of the Pontifical Council for Culture.

### 2.13 — The Pontifical Academy for Latin

The 2012 *motu proprio Latina Lingua* establishes a new institute, the Pontifical Academy for Latin, under the auspices of the Pontifical Council for Culture, but with its own president and secretary, appointed by the pope, and an academic council.<sup>43</sup> Appended to the *motu proprio* are the Academy's statutes approved *ad experimentum* by the legislator for five years (cf. c. 94 § 3). The chief purposes of the Academy are “to support the commitment to a greater knowledge and more competent use of Latin, both in the ecclesial context and in the broader world of culture,” and the “use of didactic methods in keeping with the new conditions and the promotion of a network of relations between academic institutions and scholars ... so as to make the most of the rich and multiform patrimony of the Latin civilization” (no. 4). These general aims are further detailed in articles 1 and 2 of the statutes.<sup>44</sup> There is no general revoking formula at the end but rather an explicit

<sup>43</sup> BENEDICT XVI, Apostolic Letter m.p. *Latina Lingua*, 10 November 2012, in AAS, 104 (2012), 991-995.

<sup>44</sup> Article 1. The Pontifical Academy for Latin, with headquarters in Vatican City State, is established for the promotion and appreciation of the Latin language and culture. The Academy is linked to the Pontifical Council for Culture on which it depends.

Article 2. §1. The aims of the Academy are:

- a) to encourage the knowledge and study of Latin—language and literature, classical and patristic, Medieval and humanistic—in particular at the Catholic institutions for formation at which both seminarians and priests are trained and taught;
- b) to promote the use of Latin in various contexts, both as a written and as a spoken language.

obrogation—the suppression of the Latinitas Foundation, erected by Paul VI in 1976,<sup>45</sup> by its replacement with the new Academy.

## 2.14 — Transfer of Competence for Seminaries

The 2013 *motu proprio Ministrorum institutio* has ten articles introducing a number of changes to the law of *Pastor bonus* affecting the Congregation for Catholic Education (CCE) and the Congregation for the Clergy.<sup>46</sup> The major thrust of these changes is the transfer of competency over seminaries from the CCE to the Congregation for the Clergy. The official name of the CCE is changed from the “Congregation for Catholic Education (and for Seminaries and Institutes of Studies)” to the “Congregation for Catholic Education (and for Institutes of Studies).” The *motu proprio* also suppresses the interdicasterial commission for an equitable distribution of priests throughout the world (*De aequa sacerdotum in mundo distribuzione*).

## 2.15 — Transfer of Competence for Catechesis

One of the competencies of the Congregation for the Clergy in *Pastor bonus* was that of catechesis (PB 94). In the 2013 *motu proprio Fides per doctrinam*, promulgated on the same day as the *motu proprio* transferring competence for seminaries, this responsibility for catechesis is transferred to a newly created dicastery, the Pontifical Council for Promoting the New Evangelization.<sup>47</sup> The *motu proprio* gives an explicit clause of abrogation: “Article 94 of the Apostolic Constitution *Pastor bonus* is abolished and the responsibility (*munus*) for catechesis hitherto enjoyed by the Congregation for Clergy is entirely transferred to the Pontifical Council for Promoting the

§ 2. To achieve the said aims the Academy intends:

- a) to publish and to organize meetings, study congresses and exhibitions;
- b) to set up and support courses, seminars and other training projects in coordination with the Pontifical Institute for Advanced Latin Studies;
- c) to teach the young generations a knowledge of Latin, also through the modern means of communication;
- d) to organize exhibitions, shows and competitions;
- e) to plan other activities and initiatives necessary for attaining the goals of the institution.

<sup>45</sup> PAUL VI, Pontifical Chirograph *Romani sermonis*, 30 June 1976, in AAS, 68 (1976), 481-483.

<sup>46</sup> BENEDICT XVI, Apostolic Letter m.p. *Ministrorum institutio*, 16 January 2013, in AAS, 105 (2013), 130-135.

<sup>47</sup> BENEDICT XVI, Apostolic Letter m.p. *Fides per doctrinam*, 16 January 2013, in AAS, 105 (2013), 136-139.

New Evangelization.” In addition, the direction of the International Council for Catechesis is transferred to this new dicastery. In five further paragraphs, the *motu proprio* establishes specific competencies of the Pontifical Council with respect to catechesis,<sup>48</sup> among them the power to grant approval for catechisms and other writings pertaining to catechetical instruction, with the consent of the Congregation for the Doctrine of the Faith (art. 3 § 4).

## 2.16 — Proper Law of the Apostolic Signatura

The 2008 *motu proprio Antiqua ordinatione* establishes proper law for the Supreme Tribunal of the Apostolic Signatura.<sup>49</sup> Among the matters it treats are Signatura officials and their duties, procurators and advocates, internal discipline, financial matters, competencies, judicial processes, and the contentious administrative process.

## 2.17 — Basilica of St. Paul Outside-the-Walls

The areas and buildings comprising the major basilica of St. Paul Outside-the-Walls are extra-territorial, that is, outside the jurisdiction of the Republic of Italy and governed directly by the Holy See. The pope exercises civil as well as ecclesiastical power over the complex. The purpose of the 2005 *motu proprio L'antica e venerabile Basilica* is to update the legislation pertaining to the administrative and pastoral direction of the basilica and its environs.<sup>50</sup> It establishes that the ordinary and immediate jurisdiction of the basilica is exercised by an archpriest appointed by the Supreme Pontiff. It suppresses

<sup>48</sup> The Pontifical Council for Promoting the New Evangelization:

- § 1. Is concerned with promoting the religious formation of the faithful of every age and condition;
- § 2. Has the faculty to issue norms meant to ensure that catechetical instruction is suitably imparted in accordance with the Church's constant tradition;
- § 3. Has the task of ensuring that catechetical formation is properly carried out with regard to its methods and aims, in accordance with the directives of the Church's magisterium;
- § 4. Grants the necessary approval of the Apostolic See for catechisms and other writings pertaining to catechetical instruction, with the consent of the Congregation for the Doctrine of the Faith;
- § 5. Assists the Offices for catechetics within Episcopal Conferences, follows their initiatives pertaining to religious formation which are of an international nature; coordinates their activities and, in certain cases, provides necessary assistance.

<sup>49</sup> BENEDICT XVI, Apostolic Letter m.p. *Antiqua ordinatione*, 21 June 2008, in AAS, 100 (2008), 513-538.

<sup>50</sup> BENEDICT XVI, Apostolic Letter m.p. *L'antica e venerabile Basilica*, 31 May 2005, in AAS, 97 (2005), 769-771.

the Pontifical Administration of the Patriarchal Basilica of St. Paul, established by Pope Pius XI, and transfers its powers to the Archpriest.

No mention is made of the mode of promulgation, so this raises the question of whether canon 8 § 1 is applicable, namely, whether the norms of this *motu proprio* are universal laws subject to the rule that universal laws take effect three months after their publication in the *AAS*, or whether they are particular laws subject to canon 8 § 2. According to canon 12 § 1, universal laws bind everywhere, but clearly the laws of this document are binding only in the territory of the basilica and its environs, so they are particular laws. The *motu proprio* was, in fact, published in the *AAS*, in the 3 June 2005 edition. In accord with the rule of canon 8 § 2, therefore, the new laws took effect one month from that date, that is, on 3 July 2005 (cf. c. 202 § 2).

## 2.18 — Basilica of St. Anthony of Padua

The 2008 *motu proprio* *La Chiesa* is also particular law.<sup>51</sup> It derogates from the Apostolic Constitution of John Paul II that had established particular laws for the Basilica of St. Anthony of Padua.<sup>52</sup> Attached to the *motu proprio* is a Regulation (*Regolamento*) for the “Opera del Pane dei poveri,” which is one of the charitable activities connected to this basilica. This Regulation was approved by “the Holy See” (*approvato dalla Santa Sede*), without further specification of authorship, so the approval must be presumed to be an act of executive power, not the legislative power of canon 94 § 3. For it to have been a legislative act, there would need to have been an explicit reference to papal approval of the Regulation.

## 3 — Legislation Approved in a Papal Audience

The Apostolic Letter *motu proprio* is a document form that signifies legislation (or more rarely some other act) issued in the name of the pope himself. Another papal legislative act, generally of lesser importance than the *motu proprio*, is promulgated not in the name of the pope himself but by means of a document of the Secretariat of State or a Roman dicastery. The legislative act is distinguishable from the act of promulgation. The legislator creates a

<sup>51</sup> BENEDICT XVI, Apostolic Letter m.p. *La Chiesa*, 1 November 2008, in *AAS* 101 (2009), 7-9, 344.

<sup>52</sup> JOHN PAUL II, Apostolic Constitution *Memorias sanctorum*, 12 June 1993, in *AAS*, 75 (1993), 637-642.



law when he approves it, even if only orally, but the new law has no effect without its promulgation. If the approved law is not externalized by promulgation, “it cannot be grasped by others and therefore cannot be the object of social relationships.”<sup>53</sup> As a distinct act, promulgation may be done by someone other than the legislator. This distinct act of promulgation, not done by the legislator himself, may be considered an act of executive power;<sup>54</sup> it is akin to a singular administrative decree that makes a provision (c. 48), being singular only to this one legal text now being promulgated, and no other.<sup>55</sup> It is not a mere notarial publication of the pontifical act but, either explicitly or implicitly, orders its entry into force on the date specified in law (cf. c. 8) or decreed by the legislator as noted at the end of the document.

The most common document form used to promulgate legislative approval given in an audience with the pope is the Rescript *ex audientia Sanctissimi*. According to Urrutia, this special kind of Rescript serves as cardinalatial attestation of an oral act (*oraculum vivae vocis*) of the Pontiff and constitutes fully valid juridical proof of that act having been placed by the pope.<sup>56</sup> Although not issued in the name of the pope, it is categorized in the AAS among the acts of the Supreme Pontiff, not among the acts of the Roman Curia.

The Rescript *ex audientia Sanctissimi*, meaning “Rescript from an audience with his Holiness,” is not the rescript of canons 59-75 (CCEO cc. 1527-1530). The latter rescript is a singular administrative act that grants a favour, typically in reply to an explicit petition. Rather, the Rescript *ex audientia Ss.mm.* is more versatile. Most commonly, it serves as the means for promulgating a legislative act made orally by the pope in the presence of the Secretary of State or the Cardinal Prefect of a Roman dicastery. It may be a relatively small innovation in the law, or it may promulgate special laws that only affect a particular institute such as a dicastery of the Roman Curia, the Synod of Bishops, etc. More rarely, it can promulgate an important change in canon law, such as the derogation from canon 579 by Pope Francis which decreed that the requirement of that canon to consult the Apostolic See before a diocesan bishop can establish and institute of consecrated life is *for validity*.<sup>57</sup> This special Rescript form may

<sup>53</sup> HERVADA and LOMBARDÍA, in *Exegetical Comm*, vol. 1, 54.

<sup>54</sup> Otaduy asserts that “promulgation as an act within the process of formation of law often constitutes an act of executive power.” See JAVIER OTADUY, in *Exegetical Comm*, vol. 1, 272.

<sup>55</sup> Such promulgation is similar to the execution of an administrative act, in that the act is validly enacted by the executive authority but only takes effects once it has been executed by the delegate entrusted with this task (cf. cc. 37, 40-45).

<sup>56</sup> F.X. URRUTIA, “De specifica approbatione Summi Pontificis,” in *REDC*, 47 (1990), 458.

<sup>57</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 11 May 2016, in AAS, 108 (2016), 696. Pope Francis later derogated further from canon 579 by requiring the previous written permission of the Apostolic See before a diocesan bishop may validly establish an institute

also serve as a means of publication of a judicial or an administrative act, the nature of which is known according to the matter treated, its contents, and its intended recipients.<sup>58</sup> The principal concern of this study, however, is with legislative acts.

Like the rescript of canon 59 that typically is given in response to a request, so too is the Rescript *ex audientia*. Unlike the moto proprio which, at least in theory, is issued on the legislator's own initiative, the origin of the Rescript *ex audientia Ss.mm.* comes at the initiative of another. Effectively, the petitioner is the Secretariat of State or another dicastery of the Roman Curia. The dicastery requests the innovation in the law from the pope, and the matter is discussed with and approved by him in an audience with the Cardinal Prefect or Secretary of State. The legislative act is the approval given by the pope. The Rescript itself is the means of promulgating the innovation in law. The Rescript is issued in the name of the Secretariat of State or the Roman Congregation, but the true legislator is not the one who promulgates the law but the pope himself who had made the change in law during the audience. For simplicity, the Rescript *ex audientia Sanctissimi* in the following sections will simply be called "Rescript." It is capitalized to distinguish the document form from the rescript that is a singular administrative act.

It should be noted that the Secretariat of State and Roman dicasteries at times promulgate legislative acts of the Roman Pontiff by other documents that function substantially in the same way as the Rescript *ex audientia Ss.mm.* These have dealt with various matters, including additions to the *Regolamento generale della Curia romana*<sup>59</sup> and the promulgation of an updated *Mansionario generale della Curia romana*.<sup>60</sup> There was also a

of consecrated life. FRANCIS, Apostolic Letter m.p. *Authenticum charismatis*, 10 November 2020, at [www.vatican.va](http://www.vatican.va).

<sup>58</sup> Giuliano BRUGNOTTO, "La comprensione dell'atto amministrativo e del rescritto alla luce dei cann. 16 e 17 del Codice di Diritto Canonico," in *Folia Theologica et Canonica*, 27/19 (2016), 194.

<sup>59</sup> SECRETARIAT OF STATE, *Integrazione del Regolamento generale della Curia romana*, 1 March 2008, in *Comm.* 40 (2008), 81-82. These are additions to arts. 49 and 91.

Art. 49-bis. §1. For service needs, employees can be sent on a mission outside the usual workplace. §2. The travel and subsistence expenses of the staff sent on mission are to be borne by the entity to which they belong in the manner established by the same. §3. If the trip involves a time zone change of more than three hours, the staff can take advantage of a day off within 24 hours immediately following the return. §4. Staff sent away are paid a fee according to what is established in art. 91-bis.

Art. 91-bis. To employees sent on a mission outside their usual place of work for a period that includes at least one overnight stay, according to art. 49-bis, a fee equal to 50% of their daily remuneration is paid for each day of service provided.

<sup>60</sup> SECRETARIAT OF STATE, 10 July 2009, in AAS, 101 (2009), 741-753.

change in the Good Friday Prayer for the Jews in the 1962 *Missale Romanum*, which was an oral act of Pope Benedict communicated in a notice of the Secretariat of State.<sup>61</sup> The Secretariat's notice of promulgation states: "This text must be used beginning this year in all celebrations of the liturgy of Good Friday with the above-mentioned *Missale Romanum*" [of 1962].<sup>62</sup> Also, the General Decree is sometimes used to promulgate a papal legislative approval, as discussed below in the section 4.2.

The Rescripts under the papacy of Benedict are treated in nine sections according to three broad categories. Sections 3.1 to 3.6 treat legislative matters *ad intra*, pertaining to agencies of the Holy See and its governance and activities occurring there. Sections 3.7 to 3.8 deal with legislation *ad extra*, with an application for subjects of the law throughout the Church. Section 3.9 is on an exceptional use of this special Rescript form to publish certain papal acts of executive power.

### 3.1 — Competencies of Various Dicasteries

A Rescript of 2006 reassigns competencies over the particular Churches in former Soviet countries of Europe and Asia.<sup>63</sup> The dicasteries involved are the Congregation for Bishops, the Congregation for the Evangelization of Peoples, the Congregation for the Eastern Churches, and the Secretariat of State. One might wonder why the Rescript form was chosen when other changes in competencies of the Roman Curia were promulgated by *motu proprio*. Perhaps it is due to the fact that these changes of competencies lack truly universal application to the Church at large and concern a limited number of specified countries.

### 3.2 — Regulation for the Synod of Bishops

The *Ordo Synodi episcoporum* was first published in 1966 and then modified and amplified in 1969 and 1971.<sup>64</sup> A Rescript of 2006 promulgates the same text from 1971 with some updates, especially to conform to the 1983

<sup>61</sup> SECRETARIAT OF STATE, Note *In referimento alle disposizioni*, 4 February 2008, in *EV* 25, 101-102. The prayer was published originally in *OR*, 6 February 2008, 1.

<sup>62</sup> "Tale testo dovrà essere utilizzato, a partire dal corrente anno, in tutte le celebrazioni della liturgia del Venerdì santo con il citato *Missale romanum*."

<sup>63</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 4 January 2006, in *Comm*, 38 (2006), 18-19.

<sup>64</sup> The promulgation of all three was by means of a Rescript *ex audientia Ss.mm.* See *EV*, vol. 3, 796-799.

Code and the 1990 Eastern Code, and it makes some other changes and additions.<sup>65</sup> The Rescript says that the pope approved and ordered its publication and disposed that the new text be “religiously observed” by everyone to whom it refers. This promulgation of the revised Regulation is an example of the tacit abrogation of the prior Regulation by its integral reordering (c. 20, *CCEO* c. 1502).

### 3.3 — New Foundation and Commission

Two Rescripts in 2012 established a new Vatican foundation and a new commission. In an audience with the President of the Pontifical Council for Culture, the Secretary of State reports that the pope established the Foundation “Science and Faith” with its seat in the Vatican City State. At the same time, he erected the foundation as a canonical public juridical person.<sup>66</sup> A later Rescript of the Secretariat of State announces the erection by Pope Benedict of the Independent Evaluation Commission for the Recruitment of Lay Personnel to the Apostolic See.<sup>67</sup>

### 3.4 — Changes to the Liturgical Rites for a New Pope

On 18 February 2013, shortly before his resignation, Pope Benedict approved some changes to the *Ordo rituum pro ministerii petrini initio Romae episcopi*, and he ordered that they should take effect only four days later, on 22 February. This was done in an audience with the Master of Pontifical Liturgical Celebrations.<sup>68</sup> Benedict’s papacy came to an end with his resignation on 28 February 2013.

### 3.5 — Laws Governing Employees of the Holy See

A number of the Rescripts *ex audientia Ss.mm.* issued by the Secretariat of State promulgate laws affecting only employees of the Apostolic See. These are: changes in staff salaries and executive staff salaries of the

<sup>65</sup> Secretariat of State, Rescript *ex audientia Ss.mm.*, 29 September 2006, in AAS, 98 (2006), 777-799.

<sup>66</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 10 January 2012, in AAS, 104 (2012), 116-126.

<sup>67</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 26 November 2012, in AAS, 105 (2013), 84.

<sup>68</sup> OFFICE FOR THE LITURGICAL CELEBRATIONS OF THE SUPREME PONTIFF, Rescript *ex audientia Ss.mm.*, 18 February 2013, in AAS, 105 (2013), 329-330.

Apostolic See (two Rescripts);<sup>69</sup> a Rescript issuing Norms *ad experimentum* for the protection of the dignity of the person and employees with serious pathologies and of the fundamental rights to be observed in health checks and during the employment relationship and rules for the protection of employees affected by particular serious pathologies or in particular psychophysical conditions;<sup>70</sup> and these Norms later given definitive approval;<sup>71</sup> a Rescript on social security contribution rates and retirement age;<sup>72</sup> a Rescript that promulgates a revised and amplified *Provvidenze a favore della famiglia*, which is a text of norms on the financial and social benefits of parents and children who are Vatican dependents;<sup>73</sup> a Rescript promulgating norms governing the *Istituto della contribuzione volontaria per i dipendenti iscritti al fondo pensioni vaticano*;<sup>74</sup> a Rescript promulgating revised statutes and regulations for the Vatican health care fund;<sup>75</sup> a Rescript promulgating updated *Norme sugli scatti biennali di anzianità* for employees of the Roman Curia, the Vatican City State, and organs or entities administratively managed in a direct manner by the Apostolic See;<sup>76</sup> a Rescript promulgating the particular regulation for the social security of the staff belonging to the body of the gendarmerie of the Vatican City State;<sup>77</sup> and a Rescript which promulgates an addition to art. 55 § 3 of the *Regolamento generale della Curia romana* that grants employees of the Holy See paid leave to give testimony or be interrogated in courts of the ecclesiastical or civil law.<sup>78</sup>

<sup>69</sup> Both Rescripts *ex audientia Ss.mm.* were issued by the SECRETARIAT OF STATE on 27 September 2007, in AAS, 99 (2007), 947 and 948.

<sup>70</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 15 November 2008, in AAS, 101 (2009), 65-75.

<sup>71</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 18 November 2011, in AAS, 104 (2012), 848-859.

<sup>72</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 6 April 2009, in AAS, 101 (2009), 383.

<sup>73</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 8 April 2009, in AAS, 101 (2009), 384-396. Pope FRANCIS derogated from several articles of this document. See SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 9 July 2013, AAS, 105 (2013), 715-717.

<sup>74</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 16 January 2010, in AAS, 102 (2010), 498-501.

<sup>75</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 10 July 2010, in AAS, 102 (2010), 472-497.

<sup>76</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 4 October 2011, in AAS, 103 (2011), 709-712.

<sup>77</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 27 February 2013, in AAS, 103 (2013), 297-303.

<sup>78</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 28 November 2011, prot. no. 159006/G.N.; EV 27, 844-845. This new law on paid court leave was not published in the AAS, or even in *Communicationes* or *l'Osservatore romano*; nor was any effective date

### 3.6 — Procedures for a Special Faculty

A Rescript of 2011<sup>79</sup> promulgates papal approval of a new article in the *Regolamento generale della Curia romana*. The norms of the new article follow art. 126 of the 1999 *Regolamento* dealing with approval by the pope *in forma specifica* of an administrative act of a dicastery. The new norm is broader in scope, giving the procedure to be followed in requesting any special faculty going beyond the authority of the dicastery.<sup>80</sup> This would include a request for delegation to issue a general legislative decree (c. 30). Although this change in law, published in the AAS, might seem purely an internal matter of the Curia, in reality it has a universal interest, especially

specified. Given its limited scope, it would have sufficed simply to transmit the Rescript to the several dicasteries and other entities of the Holy See.

The addition to Art. 55 §3-bis states: “Paid leave may also be granted if it is necessary to testify or respond to an interrogation in the courts of both the ecclesiastical and civil systems;

- a) in ecclesiastical tribunals the permit is part of the ordinary job;
- b) at civil courts, permission is for personal reasons;
- c) if the testimony requested is in favor of the administration, the permit is to be considered for reasons of service.

The permits referred to in letter b) are granted for the strictly necessary time up to a maximum of eighteen hours per year, after which the employee can take advantage of vacation days or hours to be recovered.

The aforementioned permits can be granted upon presentation of adequate evidence and description of the subject of the procedure and are subject to the authorization of the superior of the ministry or of the body where the employee is serving.”

<sup>79</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 7 February 2011, in AAS, 103 (2011), 127-128.

<sup>80</sup> The text of the article is as follows (translation mine).

Art. 126 bis. §1. The Dicastery, which deems it necessary to request from the Supreme Pontiff a special faculty, must make a written request through the Secretariat of State, attaching a final draft text, with the precise indication of the faculty requested, the reason for the request, and specifying any derogation from universal or particular canonical norms, which would result in their being modified or somehow disregarded.

§2. The Secretariat of State will request the opinion of the dicasteries competent in the matter and other interested persons, as well as of the Pontifical Council for Legislative Texts as regards the correct juridical formulation and, if doctrinal matters may be involved, also the Congregation for the Doctrine of the Faith.

§3. The file on the special faculties, which must be left for the Supreme Pontiff analogously to the provisions of art. 126 §3 of this *Regolamento*, will be composed of the request of the dicastery referred to in §1, from the opinions received from the dicasteries referred to in §2, from the possible reformulation of the project by the requesting dicastery, together with the foglio of the audience by the Secretariat of State.

§4. The Secretariat of State will communicate to the dicasteries of the Roman Curia the text of the faculties eventually granted by the Supreme Pontiff and, together with the petitioning dicastery, will evaluate whether and how to proceed with its publication.

to canonists who must assess the weight of documents issued by the Roman dicasteries. If this procedure is not observed, then it will be evident that a text issued by a dicastery is not legislative but only administrative.

### 3.7 — Extent of an Instruction on Homosexual Candidates

A 2008 Rescript of the Secretariat of State<sup>81</sup> clarifies those persons and institutions subject to a 2005 Instruction of the Congregation for Catholic Education<sup>82</sup> concerning vocational discernment for persons with a homosexual orientation in view of their admission to the seminary and to holy orders. The pope approved the precision that the Instruction is binding not only with respect to formation programmes for those intending to be secular clergy of the Latin Church but also concerning formation houses subject to the Congregations for the Eastern Churches, the Evangelization of Peoples, and Institutes of Consecrated Life and Societies of Apostolic Life. While the pope's oral approval of this precision was a legislative act, it did not alter the juridical value of the Instruction itself, which remains an act of executive power of the Congregation.<sup>83</sup>

### 3.8 — Norms on the Graver Delicts

A 2010 Rescript of the Congregation for the Doctrine of the Faith<sup>84</sup> promulgates an amended version of the Norms on the Graver Delicts (*graviora delicta*) first promulgated by John Paul II in his 2001 *motu proprio Sanctitatis sacramentorum tutela*.<sup>85</sup> The Norms are organized in two sections, the first containing substantive penal laws and the second containing procedural

<sup>81</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 8 April 2008, in *Comm*, 40 (2008), 83.

<sup>82</sup> CONGREGATION FOR CATHOLIC EDUCATION, Instruction *In continuità*, 4 November 2005, in *AAS*, 97 (2005), 1007-1013.

<sup>83</sup> The Instruction is directed to bishops, major superiors, and other responsible authorities, in conformity to the nature of the *instructiones* of canon 34 § 1 ("Instructions ... are given for the use of those who are entrusted with the execution of laws").

<sup>84</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, Rescript *ex audientia Ss.mm.*, 21 May 2010, in *AAS*, 102 (2010), 419. The Norms follow on pp. 419-430.

<sup>85</sup> JOHN PAUL II, Apostolic Letter *m.p. Sacramentorum sanctitatis tutela*, 30 April 2001, in *AAS*, 93 (2001), 737-739. While this *motu proprio* announced the promulgation of new substantive and procedural norms, these were not officially published. The Latin text and English translation of the Norms of 2001, and of subsequent changes made in 2003, may be found in William H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2<sup>nd</sup> ed. rev., Ottawa, Faculty of Canon Law, Saint Paul University, 2003, 303-309 and 314-316.

laws. The updated CDF Norms given legislative approval by Benedict include several changes in law, including two major changes. (1) In cases reserved to the CDF, the Congregation may in individual instances permit the administrative process to be used instead of the judicial process as normally required (art. 21). The prescription for prosecution of the graver delicts is extended from ten to twenty years (art. 7).

### 3.9 — Papal Acts of Executive Power

The Rescript *ex audientia Sanctissimi* usually promulgates a legislative act of the pope. Rarely, it is a means of publishing a more important papal act of executive power. The following are singular administrative acts of Pope Benedict, approved in a papal audience and published in this special Rescript form. The first three of these papal acts are provisions, and the final two are decisions (cf. c. 48).

- 1) In 2008, a Rescript of the Secretariat of State announces Pope Benedict's grant of two "extraordinary faculties" to the Dean of the Roman Rota.<sup>86</sup> This was not a derogation from the law; the pope granted (*ha concesso*) the faculties, which usually indicates a singular administrative act, not a legislative act. This grant of habitual faculties (cf. c. 232) to the Dean is an act of executive power, which the Rescript records. The two faculties are for the Dean (a) to exercise vigilance over the correct administration of justice in the Roman Rota and (b) to take care that all judges or (*seu*) auditors, as well as promoters of justice and defenders of the bond, diligently fulfil their responsibility (*munus*).
- 2) A 2011 Rescript reports the papal delegation of special powers to the Secretary of State.<sup>87</sup> The Pope granted the power to the Secretary of State to resolve, in the name of his Holiness, each and every question relative to the canonical and public juridical personality, direction, and operations of *Caritas internationalis* and to issue norms that may eventually be needed.
- 3) A 2012 Rescript delegates power to the Secretary of State to issue a *Regolamento* for the newly created Independent Evaluation Commission for the Recruitment of Lay Personnel at the Apostolic See.<sup>88</sup>

<sup>86</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 2 October 2008, in *Comm*, 41 (2009), 49.

<sup>87</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 17 January 2011, in *AAS*, 103 (2011), 127.

<sup>88</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 26 November 2012, in *AAS*, 105 (2013), 84.



- 4) Another 2012 Rescript publishes decisions of Pope Benedict concerning the union of the Pontifical Academy Immaculata and the Pontifical International Marian Academy.<sup>89</sup> These explicitly named “decisions” might be classified as provisions, depending on the nature of the case, whether they were acts of voluntary/favourable jurisdiction (provisions) or involuntary (coercive) jurisdiction (decisions).
- 5) A 2013 Rescript reports two papal acts of executive power that make decisions.<sup>90</sup> The first is the suppression of the public association of the faithful named “Hermanas de San Juan y Santo Domingo,” which had been erected in 2012 in the Diocese of Cordova. The suppression took effect immediately “and without the possibility that it be reconstituted under another form, whether in the Diocese of Cordova or in another diocese.” The second act is the rejection of a recourse made by a “certain number of religious” to the Apostolic See due to the lack of juridical foundation.

#### 4 — *The General Decree*

The General Decree (or simply “Decree”) is a document used for various acts, mainly legislative, especially at the level of the particular Churches and conferences of bishops.<sup>91</sup> At the level of the universal Church, it is a document form used by some of the dicasteries of the Roman Curia, but not by the pope himself. In curial practice, the General Decree has four uses with respect to legislation (as opposed to General Decrees of executive power

<sup>89</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 4 December 2012, in AAS, 105 (2013), 1182. “Il Santo Padre Benedetto XVI, pertanto, nell’Udienza concessa al sottoscritto Cardinale Segretario di Stato il giorno 12 ottobre 2012, ha preso le seguenti Decisioni:

1. si approva la predetta fusione della *Pontificia Accademia dell’Immacolata* con la *Pontificia Accademia Mariana Internazionale*;
2. la persona giuridica canonica e civile *Pontificia Accademia dell’Immacolata* è estinta ed i suoi beni, salvo diversa volontà dei donatori, vanno alla Santa Sede, a norma di Statuto;
3. si ordina che il presente Rescritto, le cui Decisioni hanno effetto immediato, sia pubblicato sugli *Acta Apostolicae Sedis*.”

<sup>90</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 10 January 2013, in AAS, 105 (2013), 186.

<sup>91</sup> The General Decree (document form) must not be confused with the general decrees of canons 29-30, which are legislative norms, nor with the general executory decrees of cc. 31-33, which are norms of executive power with a general application to the subjects of the law for whom they were given. Likewise, the General Decree must not be confused with singular administrative decrees or judicial decrees.

only). The Decree may serve to promulgate a legislative act of the pope, either his (1) approval given *in forma specifica* or (2) approval given during an audience; and the Decree also may serve to promulgate a dicastery's own legislative act, using either (3) power delegated by the pope or, in the case of the Apostolic Penitentiary, (4) its own ordinary power for a limited purpose.

#### 4.1 — Approval *in forma specifica*

A special kind of legislative act is the pope's approval *in forma specifica* of norms to be issued by a Roman dicastery. This approval is only indicated when, at its conclusion, the document says that the pope has approved in specific form either the entire document or certain of its norms. The precise words *in forma specifica approbavit* must be used.<sup>92</sup> The document form employed in these instances is typically the General Decree; other documents are rarely approved in specific form.<sup>93</sup>

Since the Roman dicasteries lack ordinary legislative power,<sup>94</sup> they cannot issue legislative acts on their own authority. To do this validly, the power must come from the supreme legislator, either by delegation of legislative power in advance of a dicastery's own approval of the norms (c. 30) or by submitting a text of norms, already approved by the dicastery, for the subsequent papal approval *in forma specifica*.

Ordinarily, the norms of a Roman dicastery are issued by an act of executive power of the dicastery. Such general administrative norms, while binding on those for whom they are made, are inferior to laws and null if contrary to law (cc. 33 § 1, 34 § 2). The usual reason for submitting a text to the pope for approval *in forma specifica* is because a dicastery is proposing one or more norms that would derogate from existing legislation. By obtaining the special papal approval, the administrative norms attain the force of law (*vis legis*) so that they may, indeed, derogate from existing universal laws (cf. c. 20).

Approval *in forma specifica* is similar in nature to the Rescript *ex audientia Ss.mm.* In both instances, the document is prepared by and issued in the name of the Secretariat of State or Roman congregation. In each case, how-

<sup>92</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, Regolamento generale della Curia romana, 30 April 1999, in AAS, 91 (1999), 629-699, art. 126 § 4.

<sup>93</sup> A notable exception is CONGREGATION FOR THE CLERGY et al., Instruction *Ecclesiae de mysterio*, 15 August 1997, in AAS, 89 (1997), 852-877.

<sup>94</sup> As mentioned, the Apostolic Penitentiary and the Pontifical Council for Legislative Texts have ordinary power limited to specific matters.

ever, the actual legislative act is that of the Supreme Pontiff. Neither involves papal delegation of legislative power.

Papal approval *in forma specifica* is contrasted with papal approval *in forma communi* (“in common form,” “in general fashion”). “When the pope approves a document of an agency of the Holy See *in forma communi*, he takes cognizance of the act but does not make it his own.”<sup>95</sup> The formula for approval *in forma communi* of a General Decree is to be found at the end of the Decree, such as the following from the papacy of Francis: “The Sovereign Pontiff Francis, in the Audience granted on 5 December 2019 to the undersigned Archbishop Secretary of the Congregation for the Doctrine of the Faith, approved this Decree and ordered its publication.”<sup>96</sup> This CDF Decree of executive power promulgates general administrative norms (cf. c. 31) concerning the celebration in the *forma extraordinaria* of saints who were canonized after the publication of the *Breviarium Romanum* and *Missale Romanum* that were in use in 1962.

#### 4.1.1 — *Philosophy studies in ecclesiastical faculties*

In the papacy of Benedict XVI, there were two instances of norms in a General Decree having been given specific papal approval.<sup>97</sup> The first of these was a 2011 Decree of the Congregation for Catholic Education on the reform of the ecclesiastical studies of philosophy.<sup>98</sup> The pope approved the entire document in general fashion, but he gave specific approval to derogations from three articles of the 1979 Apostolic Constitution *Sapientia christiana*,<sup>99</sup> which was the principal source of universal law on ecclesiastical universities and faculties until Pope Francis replaced it with a new

<sup>95</sup> Ladislav ÖRSY, *The Profession of Faith and Oath of Fidelity: A Theological and Canonical Analysis*, Wilmington, DE, Michael Glazier, 1990, 60.

<sup>96</sup> CDF, General Decree *Cum sanctissima*, 22 February 2020, at [www.vatican.va](http://www.vatican.va). This Decree promulgates norms (cf. c. 31) of the CDF concerning the celebration of saints, in the *forma extraordinaria* of the Roman Rite, who were canonized after the publication of the *Breviarium Romanum* and *Missale Romanum* that were in use in 1962.

<sup>97</sup> The concern is only with General Decrees, not with singular administrative decrees of a dicastery which, in rare instances, may be approved *in forma specifica* by the pope, e.g., CDF, Decree *Atteso che*, 27 May 2005, in *EV* 23, 496-497. Giving such papal approval to a singular decree effectively means that recourse cannot be taken against it, but it remains an act of executive power.

<sup>98</sup> CONGREGATION FOR CATHOLIC EDUCATION, Decree *Ad operam intendens*, 28 January 2011, in *AAS*, 104 (2012), 218-234.

<sup>99</sup> JOHN PAUL II, Apostolic Constitution *Sapientia christiana*, 15 April 1979, in *AAS*, 71 (1979), 469-499. The derogations are to articles 72, 81, and 83.

Constitution.<sup>100</sup> The principal changes to the three articles were to lengthen the program requirements for ecclesiastical faculties of sacred theology. The first cycle of pre-theology philosophical studies (the baccalaureate) was lengthened from two to three years (four to six semesters). The third cycle (the doctorate in theology) was specified as lasting a minimum of three years. Previously, the law was open-ended, requiring only “a suitable period of time” for the completion of the doctoral thesis and other program requirements.<sup>101</sup>

#### 4.1.2 — *Caritas Internationalis*

In 2012, the pope gave his approval *in forma specifica* to the entirety of a General Decree.<sup>102</sup> Issued in 2012 by the Secretariat of State, the Decree deals with the relationship between Caritas Internationalis and the Pontifical Council *Cor Unum*. The Decree has nine articles, after which appears this formula of special approval: “The present General Decree, having the force of law (*legge*), has been approved *in forma specifica* by the Holy Father on 27 April 2012, and it takes force according to the norm of can. 8 § 1 from the moment of its publication.” The result of this approval is that all nine articles in this General Decree had the force of universal law. They remained in effect until 1 January 2017 when the Pontifical Council *Cor Unum* was merged with three other dicasteries into the newly created Dicastery for Promoting Integral Human Development.<sup>103</sup> The statutes of Caritas Internationalis, issued by the Secretariat of State in 2012,<sup>104</sup> remain in effect under this 2017 reorganization.<sup>105</sup>

<sup>100</sup> FRANCIS, Apostolic Constitution *Veritatis gaudium*, 8 December 2017, in AAS, 110 (2018), 1-34.

<sup>101</sup> *Sapientia christiana*, art. 72c.

<sup>102</sup> SECRETARIAT OF STATE, General Decree *Il sig. cardinale*, 2 May 2012, in AAS, 104 (2012), 910-918.

<sup>103</sup> FRANCIS, Apostolic Letter m.p. *Humanam progressionem*, 17 August 2016, in AAS, 108 (2016), 968. In creating the new dicastery, Francis explicitly suppressed, in addition to the Pontifical Council *Cor Unum*, the Pontifical Council for Justice and Peace, the Pontifical Council for Pastoral Care of Migrants and Itinerant People, and the Pontifical Council for Pastoral Health Care Workers. The new law took effect on 1 January 2017 *ad experimentum* for three years. The m.p. states: “On [1 January 2017] these four Dicasteries will cease exercising their functions and will be suppressed, and articles 142-153 of the Apostolic Constitution *Pastor bonus* will be abrogated.”

<sup>104</sup> SECRETARIAT OF STATE, Decree *Nella sua enciclica*, 2 May 2012, in AAS 104 (2012), 919-921.

<sup>105</sup> FRANCIS, Statutes for the Dicastery for Promoting Integral Human Development, appended to the m.p. *Humanam progressionem*, art. 4 § 6, in AAS, 108 (2016), 969-972.

## 4.2 — Legislative Acts of the Pope

As discussed above, a legislative act of the Pope in a papal audience is normally promulgated by means of the Rescript *ex audientia Sanctissimi*. More rarely, other document forms are used for such an act, whether in an audience or in another fashion. Sometimes a Roman congregation uses the General Decree for this purpose. During Benedict's papacy, two out of five General Decrees of the Congregation for Divine Worship and the Discipline of the Sacraments function in this manner. The first of these promulgate some changes to the third edition of the Roman Missal.<sup>106</sup> The second is a change in an opening greeting of the Rite of Baptism of Children. Instead of the minister's saying, "The Christian Community welcomes you," the greeting now is, "The Church of God welcomes you."<sup>107</sup> Six of the thirteen General Decrees issued by the Apostolic Penitentiary during this period promulgate the pope's own approval of new indulgences.<sup>108</sup> This suggests that the Pope took a special interest in these indulgences, since the Penitentiary could have granted them on its own authority.

It is important to distinguish a General Decree that promulgates a papal legislative act from a General Decree approved *in forma communi* by the pope. For example, if the General Decree of the CDWDS states that the pope approved a liturgical celebration for a newly canonized saint, the approval is a legislative act; the pope is not approving the Decree of promulgation but the content of what is promulgated, the new liturgical celebration. Or, if the Apostolic Penitentiary states in a General Decree that the Pope approved a new indulgence, that too indicates the Pope's own legislative act. The General Decree in such cases is merely the document used to promulgate the pope's own act. If, however, a General Decree itself is approved by the pope *in forma communi*, the Decree remains an act of executive power.

## 4.3 — Delegated Legislative Power

Canon 30 refers to the delegation of legislative power. The canon, worded negatively, says that one who has only executive power *is unable* to issue the general decrees of canon 29 (which are laws), "unless in particular cases

<sup>106</sup> CDWDS, Decree *Congregationi de cultu*, 8 June 2008, in *Notitiae*, 45 (2008), 175-176.

<sup>107</sup> CDWDS, Decree *Vitae et regni ianua*, 22 February 2013, in *Notitiae*, 49 (2013), 54-56.

<sup>108</sup> APOSTOLIC PENITENTIARY, Decrees of 18 November 2005, in AAS, 97 (2005), 1060-1061; 15 June 2006, in AAS, 98 (2006), 580-581; 21 November 2007, in AAS, 99 (2007), 1073-1075; 28 December 2008, in *OR*, 11 January 2009, 8; 17 May 2012, in AAS, 104 (2012), 539-540; and 25 January 2013, in AAS, 105 (2013), 230-232.

it [the legislative power] has been expressly granted by the competent authority in accord with the law..." Canon 135 §2 (CCEO c. 985 §2) identifies the authority competent to delegate legislative power validly: it is only the supreme authority—the pope or the college of bishops. Thus far, all the documents treated in this study involve the *personal* exercise of legislative power by the pope. The exercise of legislative power is personal even when the Secretariat of State or another dicastery promulgates the legislation, because the legislative act is that of the pope, namely, his approval of the text during an audience. In the case of delegated power, however, the author of the legislative act is not the one who delegates the power but the one who exercises it.

The delegation of legislative power is indicated by certain standard phrases. The General Decree will state that the dicastery is acting "in virtue of canon 30," or by "special mandate," "special faculty," or similar expression indicating that the dicastery would have lacked the power to promulgate the Decree without the papal act. The delegation of legislative power is not itself a legislative act; rather, delegation is always a singular administrative act of executive power (c. 48), no matter whether the power delegated is legislative, judicial, or executive, or a delegated faculty for some non-jurisdictional act of ministry or administration.<sup>109</sup>

#### 4.3.1 — *Delicts involving attempted ordination*

An instance of explicit papal delegation of legislative power in the course of Benedict's papacy is seen in a 2007 General Decree of the Congregation for the Doctrine of the Faith. The Decree establishes new penal law for both the Latin and the Eastern Churches *sui iuris*, namely, the crime committed by one who simulates the ordination of a woman and the crime of a woman attempting to receive such an ordination.<sup>110</sup> The penalty for these crimes, in the Latin Church *sui iuris*, is *latae sententiae* excommunication; in the Eastern Churches *sui iuris*, the penalty is a major excommunication. In both, the remission of the penalty is reserved to the Apostolic See. The Decree explicitly refers to the Congregation's having received a special faculty from

<sup>109</sup> On the distinction between jurisdictional faculties granted for placing administrative acts and faculties for non-jurisdictional acts of ministry, liturgy, and administration, see John M. HUELS, *Empowerment for Ministry*, New York/Mahwah, NJ, Paulist Press, 2003, 10-13, 32-35.

<sup>110</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, General Decree on the attempted ordination of a woman, 19 December 2007, in *OR*, 30 May 2008, 1.

the supreme authority of the Church in virtue of canon 30 of the Code of Canon Law.<sup>111</sup>

#### 4.3.2 — Regulation of the Apostolic Camera

Also in 2007, the Secretariat of State issued a General Decree approving the Regulation for the Apostolic Camera (*Regolamento della Camera apostolica*).<sup>112</sup> The Secretary approved the *Regolamento* by virtue of a mandate of the Supreme Pontiff (*de mandato summi pontificis*).<sup>113</sup> Sometimes, such a mandate may simply be a directive to a dicastery to use its ordinary executive power to issue instructions or general administrative decrees on a matter within its competence.<sup>114</sup> In this case however, the *Regolamento* is special law (*speciale legge*) equivalent to the special law for the vacancy of the Apostolic See.<sup>115</sup> Thus, the exercise of delegated legislative power is implied, even if not explicit.<sup>116</sup>

#### 4.3.3 — Exception to the Roman Calendar

A 2008 General Decree of the Congregation for Divine Worship and the Discipline of the Sacraments reports that Pope Benedict had granted the Congregation a faculty to allow each church everywhere to celebrate one Mass on 25 January 2009, a Sunday, using the Mass texts for the Feast of the Conversion of St. Paul at the conclusion of the Jubilee Year in honour of St. Paul.<sup>117</sup>

<sup>111</sup> "... vigore specialis facultatis sibi a suprema Ecclesiae auctoritate in casu tributae (cf. can. 30 Codicis iuris canonici) ...."

<sup>112</sup> SECRETARIAT OF STATE, *Regolamento della Camera apostolica*, 3 March 2007, in *Comm*, 40 (2008), 63-80.

<sup>113</sup> The special mandate of the pope is recorded in SECRETARIAT OF STATE, Letter *Mi riferisco*, 3 March 2007, in *Comm*, 40 (2008), 62.

<sup>114</sup> See, e.g., CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Instruction *Redemptionis Samentum*, 25 March 2004, in AAS, 96 (2004), 546-601, no. 2 and Conclusion.

<sup>115</sup> *Regolamento della Camera apostolica*, art. 1 § 1.

<sup>116</sup> Later in 2007, a document (not a General Decree) of the Secretariat of State was issued that suppresses the Vatican canonical entity *Peregrinatio ad Petri Sedem* instituted by Pope Paul VI on 6 September 1972. It also transfers to the Administration of the Patrimony of the Apostolic See and other agencies the service up to then rendered by this entity on behalf of pilgrims to the See of Peter. The document abrogates previous norms governing its operations (no. 7). At the end of the text, delegated legislative power is indicated by the mention of a special papal mandate (*de speciali mandato summi pontificis*). See SECRETARIAT OF STATE, *Provvedimenti Ai sensi*, 27 September 2007, in AAS, 100 (2008), 46-47.

<sup>117</sup> CDWDS, Decree *Sanctum Paulum*, 25 January 2008, in AAS, 100 (2008), 404.

This “faculty” is the legislative power delegated by the pope that was necessary for the Congregation to allow the use of Mass texts contrary to the normal precedence of liturgical days established in the General Roman Calendar.<sup>118</sup>

#### 4.3.4 — *New liturgical texts*

The CDWDS also issued a General Decree with delegated legislative power promulgating the *editio typica* of the liturgical texts for the feast of Our Lord Jesus Christ Eternal High Priest.<sup>119</sup> The Decree states that the Congregation is acting in virtue of “special faculties” granted by the Supreme Pontiff (*vigore peculiarium facultatum ab eodem summo pontifice ad hoc tributarum*).

#### 4.3.5 — *Evaluation of lay personnel recruitment*

In 2012, the Secretariat of State issued a General Decree by means of which he promulgated the Regulation of the Independent Evaluation Commission for the Recruitment of Lay Personnel to the Apostolic See.<sup>120</sup> The delegation of legislative power was reported in a Rescript *ex audientia Ss.mm.*<sup>121</sup> The delegation included the power of “derogating, abrogating, or subrogating, when necessary, from the norms of the *Regolamento generale della Curia romana* and for every other action necessary for the functioning of the Commission.”

#### 4.3.6 — *Indulgences*

During the pontificate of Benedict XVI, the Apostolic Penitentiary issued thirteen General Decrees establishing indulgences. Of these, three were legislative acts of the Penitentiary using power delegated by the pope.<sup>122</sup> It is not

<sup>118</sup> *Calendarium Romanum Generale*, editio typica, 21 March 1969, Typis Polyglottis Vaticanis, 1969, no. 59.

<sup>119</sup> CDWDS, Decree *Quo efficacius*, 23 July 2012, in *Notitiae*, 49 (2012), 337.

<sup>120</sup> SECRETARIAT OF STATE, General Decree and Regolamento della Commissione indipendente di valutazione per le assunzioni presso la Sede apostolica, 30 November 2012, in AAS, 105 (2013), 85-92.

<sup>121</sup> SECRETARIAT OF STATE, Rescript *ex audientia Ss.mm.*, 26 November 2012, in AAS, 105 (2013), 84. See above, section 3.3.

<sup>122</sup> APOSTOLIC PENITENTIARY, Decree *Cum instet*, 10 May 2008, in *OR*, 11 May 2008, 7. “Itaque haec Apostolica Paenitentia, cui Beatissimus Pater commisit ut Decretum de Indulgentiis totum per spatium Anni Paulini largiendis et acquirendis praeparet atque redigat, per prae-



at all obvious, however, whether this delegation was truly needed, as the Penitentiary has ordinary power for this purpose.

#### 4.4 — Ordinary Legislative Power

The presumption of law is that the Roman dicasteries do not have legislative power (*PB* art. 18), which power is normally exercised by the pope or ecumenical council for the universal Church. Consequently, a General Decree of a Roman dicastery must be presumed not to be legislative unless it is manifestly established otherwise by an express statement of papal delegation of legislative power or approval *in forma specifica*, or by the pope's own legislative act given in an audience which is then promulgated by the Decree. However, there is an exception to this rule with respect to the Apostolic Penitentiary. According to canon 995 § 1, only those may validly grant indulgences who have this power acknowledged by law or by delegation of the Roman Pontiff. A norm of the *Enchiridion indulgentiarum* acknowledges that, in the Roman Curia, only the Apostolic Penitentiary has this power by law (cf. also *PB* 117, 120).<sup>123</sup> Of the thirteen General Decrees of the Apostolic Penitentiary during Benedict's papacy, just three exhibit the use of its ordinary power,<sup>124</sup> the others being the result of the pope's own legislative act or his delegation of legislative power (as treated above).<sup>125</sup>

sens iuxta ipsius Augusti Pontificis mentem editum, gratias, quae in sequentibus significantur, benigne dilargitur...”

Decree *Iuvenum coetus*, 28 June 2008, in *OR*, 6 July 2008, 1. “In Audientia SS.mi die XXI huius mensis Iunii infrascriptis concessa, ipse Augustus Pontifex Apostolicae Paenitentiarie specialem ad hoc facultatem expresse confirmavit, quae donum Indulgentiarum per praesens Decretum, prout sequitur, declarant...”

Decree *Paenitentiarie apostolicae*, 2 August 2011, in *AAS*, 103 (2011), 562-563. “Quibus Beatissimo Patri relatis, Apostolica Paenitentiaria speciali ad hoc facultate instructa est ut donum Indulgentiae per praesens Decretum indicaret iuxta ipsius Summi Pontificis mentem, prout sequitur...”

<sup>123</sup> *Enchiridion indulgentiarum: normae et concessiones*, 4<sup>th</sup> ed., Libreria Editrice Vaticana, 1999, no. 6, promulgated by APOSTOLIC PENITENTIARY, Decree *Iesu, humani generis*, 16 July 1999, in *AAS*, 92 (1999), 301-302; the norms of the fourth edition of the *Enchiridion indulgentiarum* are also in *Notitiae*, 36 (2000), 70-97.

No. 6 of the *Enchiridion* states: “In Romana Curia, Apostolicae dumtaxat Paenitentiarie committuntur ea, quae spectant ad concessionem et usum indulgentiarum, salvo iure Congregationis pro doctrina fidei ea videndi, quae doctrinam dogmaticam circa easdem respiciunt.”

<sup>124</sup> APOSTOLIC PENITENTIARY, Decrees *Cum in originale*, 25 January 2007, in *AAS*, 99 (2007), 201-203; *Instat dies*, 25 April 2009, in *OR*, 13 May 2009, 6; *Die quinquagesimo anniversario*, 14 September 2012, in *AAS*, 104 (2012), 854-858.

<sup>125</sup> Does this suggest that the pope took a more personal interest in the other ten grants of indulgences, or perhaps that the Penitentiary simply has no consistent practice in this regard?

## Conclusion

The standard document forms of the Apostolic See for legislative acts are the Apostolic Constitution, the Apostolic Letter given *motu proprio*, the Rescript *ex audientia Sanctissimi*, and the General Decree (a.k.a. “Decree”). The Apostolic Constitution is used for various important papal acts, be they doctrinal, legislative, or administrative. If legislative, this document form indicates a major innovation or reform of one or more areas of canonical discipline, or the promulgation of an important text of the *munus docendi* (e.g., universal Catechism) or *munus sanctificandi* (e.g., new edition of the Roman Missal). Benedict XVI issued only one legislative Apostolic Constitution, whereas three have been promulgated in the first eight years of Francis’s papacy. The small number of such legislative Constitutions reflects their importance, in that this document form is reserved for legislative acts of the highest order.

Ranking second is the most common document form used for papal legislation, the Apostolic Letter given *motu proprio*, i.e., on the pope’s own initiative. It typically is used for important, but limited, changes in the law, not for a thorough reform or major innovation. Pope Benedict issued eighteen *motu proprios* during his nearly eight years in office. In the same amount of time,<sup>126</sup> Pope Francis issued thirty-one.

The pope may also use his legislative power by means of an act of approval given in an audience with the Secretary of State or the head of a Roman dicastery. The most common document form for promulgating this kind of legislative approval is the Rescript *ex audientia Sanctissimi*, of which there were eight in Benedict’s pontificate and nineteen in the same timeframe during the papacy of Francis. In addition, other documents are sometimes employed for this purpose, including the General Decree.

The General Decree is a document form of the Roman Curia (and a mainstay of particular law). All the juridically binding documents of the Curia, including the General Decree, are generally acts of executive power. However, a Decree is legislative, or promulgates legislative content, when it indicates: (1) papal approval *in forma specifica*, whether in part or in whole; (2) an act of legislative approval (of a liturgical rite, indulgence, statutes, etc) in a papal audience, which is not to be confused with approval *in forma communi* of the Decree itself; or (3) the dicastery’s use of legislative power delegated by the pope. In addition, the Apostolic Penitentiary occasionally employs its own ordinary power for the grant or use of indulgences.

<sup>126</sup> See footnote 2 above.

Of the fifteen legislative General Decrees promulgated by dicasteries of the Roman Curia during the papacy of Benedict XVI, one has partial approval and another entire approval *in forma specifica*; two General Decrees promulgate legislative acts of the pope; eight evidence use of legislative power delegated by the pope; and three are acts of ordinary legislative power. In the comparable period of Francis's pontificate, no General Decrees are partially or entirely approved *in forma specifica*; six General Decrees promulgate legislative acts of the pope; three evidence use of legislative power delegated by the pope; and one is an act of ordinary legislative power.<sup>127</sup> The other General Decrees issued by Roman congregations during this timeframe are acts of executive power, being approved only *in forma communi*.

During his entire papacy, the total number of legislative acts of Benedict XVI is thirty-one, not counting legislative acts of the Curia or civil laws. During the same period of time, the total number for Francis is fifty-nine, nearly twice as many as Benedict's total. Francis's legislative output is nearly double that of Benedict's for the same length of time, and further legislative reforms are still in progress.

Ideally, it would be possible for the Church's pastors and officeholders to grasp the nature and weight of a papal or curial document just by identifying its form. As this and other studies have shown, however, the reality is much different. Even the most reliably legislative documents, like the Apostolic Letter *motu proprio* and the Rescript *ex audientia Ss.mm.*, are at times used for a quite different purpose, such as issuing singular administrative decrees that make a provision or decision. Or, two General Decrees issued by the same Roman congregation may have differing juridical values, one being legislative and the other administrative. In fact, there is no document form presently in the *praxis Curiae romanae* that is used for only one kind of act. This may doubtless give rise to misinterpretation (even at times by Church officials who regard everything that comes out of "Rome" as of equal weight). Given the complexity of the matter, accurately assessing the juridical value and import of papal and curial documents generally cannot be done on a consistent basis without the aid of a knowledgeable canonist.

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<sup>127</sup> All are available at [www.vatican.va](http://www.vatican.va). The legislative acts of the pope are published in the General Decrees of the CDWDS of 29 May 2014, 11 February 2018, 25 January 2019, 7 October 2019, and 18 May 2020 as well as a Decree of the APOSTOLIC PENITENTIARY of 24 June 2013; the Decrees that are acts of delegated legislative power are those of the CDWDS of 1 May 2013, 6 January 2016, and 25 March 2020; and the Signatura used its ordinary power in its Decree of 23 November 2014.

*“It might appear to some that the Church has an overabundance of pronouncements and legislation. This is probably true in some instances. On the other hand, it is to the great advantage of the people of God that Christ endowed his Church with the means to loosen and to bind so that it may find itself in a better position to answer the needs of humanity and provide for the spiritual well-being of all its members.”*<sup>128</sup>

<sup>128</sup> Quoted from Francis G. MORRISEY, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the Code of Canon Law*, 2<sup>nd</sup> ed. rev. and updated by Michel Thériault, Ottawa, Faculty of Canon Law, Saint Paul University, 1995, 46.

## SCHMALZGRUEBER'S *CONSILIUM* LXXIII AS A CASE STUDY IN THE CANON LAW OF REBAPTISM

RONNY E. JENKINS

**SUMMARY** — This study centers on a case of a doubtfully valid baptism which is analysed at length by Franz Xavier Schmalzgrueber in his 1740 work, *Consilia seu responsa iuris*. The case concerns the petition for a new baptism of a woman who believes her first baptism to have been invalid. The A. presents Schmalzgrueber's treatment of conditional baptism when there is a reasonable doubt of fact or law concerning a prior baptism. The study concludes with a brief discussion of the contemporary relevance of Schmalzgrueber's *Consilium* 73.

**RÉSUMÉ** — Cette étude est centrée sur un cas de baptême douteusement valide qui est analysé en détail par Franz Xavier Schmalzgrueber dans son ouvrage de 1740, *Consilia seu responsa iuris*. Le cas concerne la demande d'un nouveau baptême d'une femme qui estime que son premier baptême n'était pas valide. L'A. présente le traitement par Schmalzgrueber du baptême conditionnel lorsqu'il existe un doute raisonnable de fait ou de droit concernant un baptême antérieur. L'étude se termine par une brève discussion sur la pertinence contemporaine du *Consilium* 73 de Schmalzgrueber.

### *Introduction*

The Church's response to doubtful conferral of baptism has remained constant for centuries. The sacrament of baptism imparts an indelible character on its recipient. For this reason, and to safeguard the dignity of the sacrament, persons once validly baptized are not to be baptized again. At the same time, it is not uncommon for doubts to arise as to whether a given baptism did, in fact, take place or, if it did, whether it was validly conferred.

In such cases, a diligent investigation is to take place. If reasonable doubt remains, a conditional baptism should ensue.<sup>1</sup>

The celebrated Jesuit canonist Franz Xavier Schmalzgrueber<sup>2</sup> was born in Bavaria in 1663. He taught moral theology in Ingolstadt from 1702, and then canon law in Dillingen from 1705 and in Ingolstadt from 1709. In 1716 he assumed the position of chancellor of the University of Dillingen where he died in 1735, after many years of teaching, writing, and practice of the Church's law. He is most renowned for his immense commentary on canon law, the *Jus canonicum universum*, which retained an exceptional influence for two centuries after its publication.<sup>3</sup> Schmalzgrueber is less well known for his two-volume collection of *Consilia*, or legal opinions regarding contemporary issues that arose before ecclesiastical and secular courts or in legal practice.<sup>4</sup> It is in the *Consilia*, first published in Ingolstadt in 1722, that the eminent jurist applies the legal doctrine treated in his commentary to concrete situations. When doing so, he often provides a fuller treatment of the subject at hand than he does in his commentary. This is the case with his presentation of conditional baptism in the 73<sup>rd</sup> *Consilium*.

Schmalzgrueber gives an intriguing title to his 73<sup>rd</sup> *Consilium*: *In the case of doubt of the validity of baptism conferred by a Lutheran preacher leading an evil life*.<sup>5</sup> This article will first present a brief introduction to the case captioned by this title. It concerns the petition for rebaptism of a woman

<sup>1</sup> Canon 845, which repeats substantially canon 732 of the Pio-Benedictine Code, reads: “§ 1. Sacramenta baptismi, confirmationis et ordinis, quippe quae characterem imprimant, iterari nequeunt. § 2. Si, diligenti inquisitione peracta, prudens adhuc dubium supersit num sacramenta de quibus in § 1 revera aut valide collata fuerint, sub condicione conferantur.” CCEO canon 672 contains the same stipulations and almost identical wording.

<sup>2</sup> “[Schmalzgrueber] gehört zu denjenigen Canonisten, welche sich bei der Kurie und der ganzen kurialen Richtung bis auf den heutigen Tag eines grossen Ansehens erfreuen. Daraus erklärt sich wohl auch der autoritative Charakter, den selbst Protestanten seinen Schriften beizulegen scheinen.” Johann Friedrich VON SCHULTE, *Die Geschichte die Quellen und Literatur des kanonischen Rechts*, vol. 3, Stuttgart, Ferdinand Enke, 1880, 160 [= SCHULTE, *Die Geschichte*]. For more on Schmalzgrueber's life, especially at the time of the publication of the *Consilia*, see Eugen Heinrich FISCHER, “Auf den Spuren eines grossen Dillinger Kirchenrechtslehrers und Universitätskanzlers,” in *Dillingen und Schwaben. Festschrift zur Vierhundertjahrfeier der Universität Dillingen*, Dillingen, 1949, 50-65.

<sup>3</sup> The *Jus canonicum universum* was published twice in Ingolstadt, first from 1717-1727 and then in 1728. A subsequent edition was published in Naples in 1738 and a final one by the Apostolic Camera in Rome from 1843-1845. SCHULTE, *Die Geschichte*, 161.

<sup>4</sup> The *Consilia* were again published eighteen years later in Dillingen. This article uses the Dillingen edition for the text of *Consilium* 73. Franz Xavier SCHMALZGRUEBER, *Consilia seu responsa iuris*, vol. 1, Dilingae, Typis Bencardianis, 1740, 735-740 [= SCHMALZGRUEBER, *Consilia*]. All subsequent references to Schmalzgrueber are to this work.

<sup>5</sup> *In casu dubii de valore Baptismi collati a Praecone Lutheranorum malae vitae*.

named Nathalie who claimed her original baptism was invalid because she was baptized in the name of the Devil by a Lutheran wizard or sorcerer. It will then present Schmalzgrueber's doctrinal treatment of conditional baptism in the presence of reasonable doubt of fact or law concerning a prior baptism. In doing so, it will draw on the authors he cites, explicating their own teaching and illustrating their use of examples, something Schmalzgrueber himself does not usually undertake.<sup>6</sup> Following that, the article will examine Schmalzgrueber's resolution of Nathalie's petition based on the legal positions he expounds. Finally, a brief discussion of the contemporary relevance of Schmalzgrueber's *Consilium* will conclude the article.

## 1 — *The Circumstances of the Case of Nathalie and the Demons*

In 1722, the same year of the publication of Schmalzgrueber's 73<sup>rd</sup> *Consilium*, and the last century of witch trials in Europe, two celebrated processes took place near Dillingen where Schmalzgrueber was serving as Chancellor.<sup>7</sup> In the town of Freising, twenty-two persons were accused of witchcraft, of which eleven were sentenced to death, all but three of whom were eighteen years old and younger. A year later, this time in Eichstätt, the twenty-two-year-old Marie Walburga was convicted and sentenced to beheading and the burning of her corpse, this after she confessed to her alleged crime while under torture and despite the protests of her innocence from the officials of her hometown.<sup>8</sup>

<sup>6</sup> In *Consilium* 73, Schmalzgrueber cites almost exclusively fellow Jesuit authors whereas in the *Jus canonicum universum* and the other *consilia* he published he frequently cites non-Jesuit authors, such as the Franciscan Anaklet Reiffenstuel and the secular priests Agustin Barbosa and Diego de Covarubias, to name only three of the more eminent canonists nearly contemporary to him.

<sup>7</sup> Siegmund Riezler refers to the years 1589-1631 as the period of "the epidemic of witch trials in Bavaria," and the 1800s as the last century to see them. *Geschichte der Hexenprozesse in Bayern*, Stuttgart, Cotta, 1896, vi, viii [= RIEZLER, *Geschichte der Hexenprozesse*]. For a more recent treatment of witchcraft and witch trials in Germany, see Wolfgang BEHRINGER, *Hexen und Hexenprozesse in Deutschland*, Munich, Deutscher Taschenbuch Verlag, 2000. Kors and Peters note: "Although occasional witch scares and executions continued in the more remote areas of Europe ... by the end of the [18<sup>th</sup>] century, witchcraft had become a topic of historical rather than contemporary interest." Alan KORS and Edward PETERS (eds.), *Witchcraft in Europe 400-1700*, Philadelphia, University of Pennsylvania Press, 2001, 392.

<sup>8</sup> RIEZLER, *Geschichte der Hexenprozesse*, 295-296. The editors include in this same volume the records of two witch trials in Bavaria, one from 1628 in Bamberg and the other from 1629 in Würzburg. *Ibid.*, 348-354.

Not too many years before this, sometime at the turn of the eighteenth century, a child named Nathalie was born to two Lutheran parents. A Lutheran preacher [*praeco*] baptized her a few years later. As an adult, Nathalie subsequently converted to the Catholic faith. Following her conversion, she suffered great anxiety concerning the validity of her baptism. To live peacefully in her new faith, and to remove the relentless anxiety she suffered, Nathalie requested rebaptism. Her petition arose due in no small part to the constant torments she claimed to suffer at the hands of the devil and his demons. Rebaptism, she insisted, would heal her and bring peace at last.

Nathalie presented six substantial causes that she claimed either raised doubt about her baptism's validity or served as certain proof of its invalid character. These will be discussed in more detail later. In summary, she asserted that her first baptism was invalid because she was baptized by a Lutheran minister who was actually a wizard or sorcerer. For this reason, he baptized her in the name of the Devil and not in the name of the Holy Trinity. Her aunt would attest to this, as could her father who himself had entered a pact with the Devil to save his failing business. Besides all this, there was simply no proof that her baptism had even taken place since the current Lutheran preacher of the place of baptism had equivocated, if not lied, about the church records.

Nathalie now wished to be free of the molestation of the demons and insisted the reception of valid baptism would achieve this. However, since she had already been baptized, and baptism was not to be repeated, the primary question for Schmalzgrueber becomes whether Nathalie can be rebaptized licitly. It is the answer to this question that provides not only an insight into the times in which this *Consilium* was written, but also conveys a full and significant exposition of the canonical doctrine on rebaptism, one that is as doctrinally and practically applicable today as it was during Schmalzgrueber's time, even if the circumstances that lead to doubtful baptisms would not likely be the same as those encountered by Nathalie.

## 2 — *The Canonical Doctrine on the Repetition of Baptism*

Schmalzgrueber begins his exposition of the legal doctrine of rebaptism by stating the fundamental question at play: "Whether Nathalie can be licitly baptized anew."<sup>9</sup> In short, baptism must be administered conditionally if there is a reasonable doubt that the original baptism had taken place or been

<sup>9</sup> SCHMALZGRUEBER, *Consilia*, nn. 2ff.



validly administered.<sup>10</sup> If there is no doubt that the baptism had never taken place, then it is not repeated conditionally but is absolutely conferred. Conversely, in the presence of reasonable doubt, baptism is never administered absolutely, but only conferred under some condition related to the source of the persistent doubt.<sup>11</sup>

The reasonable doubt may arise in the parish priest who had baptized the person or in the person himself who had doubtfully received the sacrament. The pastor's own doubt is significant due to his obligation to attend to the salvation of his parishioners. This demands that he allow no substantial error in the use of the formula of baptism or the manner in which it is administered. When necessary, he may also be required to assure that a baptism even took place. When reasonable doubt of law or fact occurs, in either the one baptizing or the one baptized, the safer route demands a conditional baptism. Conditional baptism is also the more prudent (indeed, merciful) choice when adults are uncertain as to the validity of their own baptism or that of another whom they baptized in a case of necessity.<sup>12</sup> In fact, if the validity of baptism is not morally certain, the one questionably baptized, be it a child or an adult, has a right (*ius*) to conditional baptism.<sup>13</sup>

Schmalzgrueber cites two canons from the fourth Distinction of Gratian's *de consecratione*. The first is a decretal most likely from Pope Gregory III (731-741) to a bishop. It stipulates that children who are removed from their parents should, according to the tradition of the Fathers, be baptized if it is unknown whether they already had been and there are no witnesses to that

<sup>10</sup> Schmalzgrueber acknowledges from the outset his thoroughgoing reliance on a work of George Gobat (1600-1679), an influential Jesuit moral theologian of his time and one that Schmalzgrueber cites with some regularity in several other *consilia*. In his *Experimentalis theologiae de septem sacramentis*, Monachii, Joannis Kaecklini, 1685 [= GOBAT, *Experimentalis theologiae*], Gobat first presents the canonical discipline applicable to rebaptism. He then applies this to numerous cases of doubtful baptism, including those where demonic influence or possession is alleged as a basis for the baptism's invalidity. However, unlike Schmalzgrueber, Gobat provides merely a paragraph or two by way of illustration of individual cases. For more on Gobat, see SCHULTE, *Die Geschichte*, 142.

<sup>11</sup> A point offered lucidly by Gabriel VÁSQUEZ, *Commentariorum ac disputationum in tertiam partem S. Thomae*, Ingolstadii, Martini Nutii, 1612, Disp. 146, Cap. 4, nn. 19-20 [= VÁSQUEZ, *Commentariorum*].

<sup>12</sup> Most commonly this involved midwives who baptize babies they deliver when necessity demands it.

<sup>13</sup> As expressed, for instance, by Gaspard HURTADO: "Observandum est, eum cui alias extra necessitate ex officio incumbit baptizare, teneri etiam extra necessitate baptizare sub conditione eum, cuius Baptismus non est omnino moraliter certus..., sive sit parvulus sive adultus, quia sic baptizatus habet ius, aut quasi ius, ut baptizetur sub conditione." *Tractatus de sacramentis et censuris*, Antuerpiae, Balthasaris Moreti, 1533, 51.

fact.<sup>14</sup> The second canon, from the Fifth Council of Carthage (401), provides that children are to be rebaptized when the most credible of witnesses are unavailable to testify that baptism took place and the children themselves cannot do so since they were too young for reliable recollection.<sup>15</sup> In such cases, failure to rebaptize might deprive someone of the cleansing waters of baptism. Both canons are foundational for subsequent canonical treatment of the subject of rebaptism. Simply put, if certainty cannot be reached that a baptism took place, rebaptism is always to follow given its significance for an individual's salvation.

Two of many available examples of doubtful baptism illustrate the situations faced by the canonists of Schmalzgruebers' time. The first relates to the matter used for baptism and the second to the intention required to administer it validly. Melchior Zambrano discusses the need for double conditional baptisms concerning someone baptized who is in danger of death.<sup>16</sup> It might be unclear to the one administering the baptism whether the water available is true water or instead some mixture that might result in an invalid baptism. If so, the baptism should proceed conditionally (If this is true water, I baptize you). Afterwards, when true water is certainly available, a second conditional baptism should take place (If you are not baptized, I baptize you) to remove any doubt concerning the first. Again, Antonio de Quintanadueñas describes the case of a midwife who baptized numerous children in danger of death, but who cannot recall who these might have been or whether she truly had the proper intention to baptize them. Consequently, all the children she attended had to be rebaptized conditionally, whether they were still children or now adults.<sup>17</sup>

A further, related cause for conditional baptism is the grave obligation that all have to remove any doubt of conscience that they have done what is necessary to avoid eternal damnation for themselves or others. Thus, immediately following an investigation that confirms that the validity of the first baptism either cannot be known or cannot be demonstrated, conditional rebaptism must take place under penalty of grave sin and the harshest

<sup>14</sup> D. 4. de cons. c. 110. The importance of this canon to the tradition, and the direct simplicity of its wording, make it worth quoting here: "Paruulos, qui parentibus subtracti sunt, et an baptizati sint an non, ignoratur, ut hos baptizare debeas secundum Patrum traditiones, si non fuerint qui testificetur, ratio poscit." FRIEDBERG, I, 1395.

<sup>15</sup> D. 4. de cons. c. 111. FRIEDBERG, I, 1396.

<sup>16</sup> Melchior ZAMBRANO, *Aureae decisiones casuum conscientiae*, Moguntiae, Conradi Butgenii, 1606, D. 1, C. 1, *de Baptismo*.

<sup>17</sup> Antonio DE QUINTANADUEÑAS, *Singularia theologiae moralis ad septem ecclesiae sacramentum*, Hispali, Franciscus de Lyra, 1645, Tract. 1, Sing. 1, n. 1 [= QUINTANADUEÑAS, *Singularia theologiae moralis*].

censure. There can be no reasonable cause to delay the sacrament.<sup>18</sup> To this point, Schmalzgrueber cites another canon from Gratian's *de consecratione*. Pope Leo the Great resolves the question of what to do with those who were raised in captivity from infancy. As we have already seen, if after thorough investigation there are no sure witnesses who can attest to the baptism of the freed captives, and they cannot do so themselves, they may undergo baptism without any harm to their conscience. However, this canon adds that if their death is imminent, baptism can take place before the investigation is concluded, if not immediately.<sup>19</sup>

An especially practical question now arises. If conditional baptism is to take place in cases of reasonable doubt regarding the validity of the original baptism, what constitutes reasonable doubt? Reasonable doubt is present when sufficient indications (*indicia*) arise to raise suspicions as to whether the person was truly baptized. The suspicions do not need to lead to an absolute or definitive judgment of invalidity. Moral certitude regarding invalidity is not the high standard required here. It is enough that the fact of baptism or its validity cannot be established. In this sense, moral certainty should actually be achieved regarding the validity of baptism. If one is less than morally certain and the doubt cannot be removed, conditional baptism ensues.<sup>20</sup>

As to what constitutes moral certainty, Gobat offers a positive and a negative response. First, "when a prudent person attentive to the circumstances

<sup>18</sup> GOBAT, *Experimentalis theologiae*, n. 357: "Quia autem vix occurrit rationabilis causa differendi diu repetitionem Baptismi post ortum rationabilem dubium, debitamque pervestigationem Veritatis, idcirco obligatio procurandi mox reiterationem Baptismi est sub mortali."

<sup>19</sup> D. 4 de cons. c. 112: "Atque ideo, quociens persona talis inciderit, sollicita primum examinatione discutite, et longo tempore (nisi forte supremus finis imineat) indagate, utrum nemo penitus sit, qui testimonio suo iuvare possit ignorantiam nescientis, et, cum constiterit, hunc, qui baptismatis indiget sacramento, sola inaniter suspicione prohiberi, accedat intrepidus ad consequendam gratiam." See also, D.4 de cons. c. 113.

<sup>20</sup> As Quintanadueñas states: "Certitudine saltem morali constare debet de baptismo alicuius: ut non iteretur: igitur si haec haberi non possit, ut non potest de baptismo horum omnium; iterari necessum erit." Tract. 1, Sing. 1, n. 7). Later the same author relates that he had heard from a reliable source that in Lisbon three prominent ecclesiastics, an episcopal vicar, the dean of a chapter and a parish priest, all confessed that they had never had the intention to baptize those to whom they administered the sacrament. Another parish priest of the area supposedly admitted that whenever he consecrated the Eucharist, he bowed his head to the ground, not out of reverence, but because he had withdrawn the intention to consecrate the species. QUINTANADUEÑAS, *Singularia theologiae moralis*, Tract. 1, Sing. 4, n. 3. Even a cursory review of the authors of this time reveals the many illustrations they provide, gained firsthand or through hearsay, of the doubtful administration of the sacraments. These can provide a fascinating view (albeit necessarily limited) into the ecclesiastical culture and thought of the time.

is rendered certain.”<sup>21</sup> Alternately, “when something is prudently held such that the contrary is in no way considered possible.”<sup>22</sup> The authors most commonly discussed situations where the formula of baptism differed more or less from the established trinitarian form. When doubts arose regarding alternate wording, conditional baptism would almost always be recommended.<sup>23</sup> This will fundamentally be the question concerning Nathalie’s petition. Was the correct formula used by the Lutheran minister? Or does probable suspicion arise that he might well have baptized her in the name of the Devil?

However, moral certitude regarding a reasonable doubt on the validity of baptism is lacking if there is at least one eyewitness, or an otherwise worthy witness, who is without suspicion of error or falsehood, attests to the baptism having taken place in a valid manner.<sup>24</sup> Still, reasonable doubt remains even here if the testimony of such a witness does not allow for moral certitude regarding the fact or validity of the baptism. Witnesses must provide the highest degree of certainty regarding what they assert.<sup>25</sup> Importantly, since the question of rebaptism regards whether reasonable doubt exists, those witnesses who credibly attest to errors regarding the original baptism are to be preferred over those who do not.<sup>26</sup> In the end, if it remains equally probable based on witness testimony that the baptism was valid or invalid, reasonable doubt is said to exist.<sup>27</sup>

For cases illustrative of this point, Schmalzgrueber cites two *dubia* from Cardinal Juan De Lugo’s *Responsa moralia*. In that work, De Lugo (1583-1660) asks whether baptisms must be repeated in which the water touches

<sup>21</sup> “*Moralem certitudinem esse, quando vir prudens attentis circumstantiis, redditur certus.*” GOBAT, *Experimentalis theologiae*, n. 365. Gobat adopts this description from Tomas SANCHEZ, *De matrimonio*, Lib. 2. Disp. 45. n. 4.

<sup>22</sup> “*Quando aliquid prudenter ita creditor, ut contrarium videatur nullo modo probabile.*” GOBAT, *Experimentalis theologiae*, n. 365.

<sup>23</sup> Among these authors is Francisco Suarez, cited by Schmalzgrueber, who devotes a relatively extensive commentary to the question of the form of baptism and the wording used by the one administering it. SUAREZ, *De sacramenti*, Venetiis, Typographia Balleoniana, 1747, Disp. 21, Sect. 1-7. Suarez highlights the disagreements among scholars of the misuse of various formulas. For Schmalzgrueber, if there is doubt as to the validity of a formula—evidenced by the debates regarding any given use—the safer route is always conditional baptism.

<sup>24</sup> SCHMALZGRUEBER, *Consilia*, n. 5, notes that this is held in common by all the authors. He then provides an illustrious list: Pietrus Paludanus, Alphonsus de Soto, Aeneas Sylvius, Francisco Suarez, Gabriel Vasquez, and Paul Laymann.

<sup>25</sup> “*Testes certissimi, qui eos baptizatos esse sine dubitatione testentur.*” SCHMALZGRUEBER, *Consilia*, n. 6.

<sup>26</sup> SCHMALZGRUEBER, *Consilia*, n. 16; GOBAT, *Experimentalis theologiae*, n. 386.

<sup>27</sup> Juan de LUGO, *Responsa moralia libri sex*, Lugduni, Philippi Borde, 1660, Lib I, Dub. 1-2.

only the hair of those baptized or when the baptism was administered by Calvinist ministers. Regarding the first doubt, he concludes that the opinion of proven authors continues to differ on the validity of such baptisms. Therefore, they are to be repeated conditionally if there is probable doubt that the water failed to touch any part of the body but ran instead only over the hair. As for Calvinist ministers, the Church has long taught that faith is not required in the minister of baptism, only that he intend to do what the Church intends. Thus, if we are sure of what matter and form the minister used, there is no cause for conditional baptism (presuming he had the proper intention). Consequently, de Lugo concludes, the question becomes one of law, not of fact. In both cases, witness testimony will be determinative of the presence of doubt since the question regards facts; namely, did water touch the body and did a minister have the proper intention? Where witnesses cannot remove all reasonable doubt, conditional baptism ensues. Schmalzgrueber repeats that as with episcopal and priestly ordination, the "certain and safe" route should always be chosen to assure the validity of the sacrament received.

At the same time, there also exists a danger that conditional baptism might be requested rashly or when there is slight doubt regarding the original baptism. If so, the request should be denied so that the dignity of the sacrament is not harmed (and so no harm comes to the soul of the one making the petition). As we will see, however, the general rule must be that when there is doubt regarding the validity of a baptism, the matter should always be resolved in favor of the person rather than the sacrament. Schmalzgrueber clearly wishes to emphasize this position. In support of it, he again cites Pope Leo the Great<sup>28</sup> and then Saint Augustine<sup>29</sup> to argue that even prudent caution should not hinder something taking place that is for the good of souls. Hence, with baptism a failure to rebaptize when it is necessary is a far worse outcome for souls than to baptize in good faith when it is not actually required. Vásquez then provides a rationale: "Since the sacrament was instituted for the benefit of persons, that reasoning is preferred which serves a brother's need over the reverence due to the sacrament."<sup>30</sup>

Schmalzgrueber proceeds to argue that since the sacraments are inanimate things (*res est inanima*) they do not experience (*sentient*) any ill effect from their repetition when unwarranted. On the contrary, the person who was

<sup>28</sup> D.4 de cons. c. 113.

<sup>29</sup> D.7 de paenit. c. 4.

<sup>30</sup> "Quia, cum Sacramentum institutum sit in hominum utilitatem, potius habenda ratio est necessitates fratris, quam reverential debita sacramento." VÁSQUEZ, *Commentariorum*, D. 155, c. 3, n. 4.

originally baptized invalidly and who does not receive a new baptism does experience the consequent negative effects; indeed, perhaps for all of eternity.<sup>31</sup> Nor does repetition of baptism disparage Christ as the author of the sacraments when it is done in good faith in the presence of reasonable doubt. Only when the rebaptism takes place for vain or futile reasons, or out of a sense of disparagement, does injury occur. Rebaptism done out of a sense of Christian piety and in hope of the eternal reward promised by Christ causes no harm.

Despite the strong preference for the good of souls, there is still a need for a degree of caution. The parish priest should neither rush thoughtlessly to confer a conditional baptism nor hesitate to do so unduly. Unless the presence of reasonable doubt is clear and certain, he should prudently consult with his superior or, if this is not possible, with expert and pious persons. This is especially important so that the priest does not hesitate to rebaptize when true doubt urges it. Such consultations will include a consideration of all the facts and circumstances related to a particular case. Commonly accepted presumptions will also inform the investigation. To name one, when someone is baptized who was born of Catholic parents and educated by faithful Christians, a vehement presumption arises that it was administered properly.<sup>32</sup> Still, with children baptized under these conditions, and even when they reach adulthood, conditional baptism can take place once this presumption is overturned, based largely on the recommendation of educated and pious persons.

On the contrary, and especially pertinent to Nathalie's case, when children are born and raised by parents who practice witchcraft, no presumption whatsoever arises that they were rightly baptized. For it is well known that parents and pastors who are wizards and witches commonly baptize their children in the name of the Devil.<sup>33</sup> When grave infestation of demons and evil spirits follows, so too does a prudent suspicion that they were baptized invalidly or

<sup>31</sup> As Schmalzgrueber forcefully asserts: "Contra vero sentit [the one who did require baptism, but did not receive it], et horrendo sentit anima, sentietque fortassis in omnem seculuram aeternitatem, si non mundetur Baptismo, quando esset emaculanda per iterationem." *Consilia*, n. 9,

<sup>32</sup> To this point, Schmalzgrueber (*Consilia*, n. 11) cites Paul LAYMANN (Lib. 5, Tract. 2, c. 5, n. 4) and Gobat, who writes more fully of this rule: "De illo, qui natus est ex fidelibus parentibus, et inter Christianos fideliter conversatus, tam violenter praesumitur, quod fuerit baptizatus, ut hae praesumptio pro certitudine sit habenda, donec evidentissimis forsan argumentis contrarium probetur." GOBAT, *Experimentalis theologiae*, n. 383.

<sup>33</sup> The words Schmalzgrueber uses are these: "Nam tales Parentes, et Pastores venefici solent Liberos et Subditos suos baptizare in Diaboli nomine, huicque illos tradere et dovere." *Consilia*, n. 12.

not baptized at all. The proof of this arises from observation of the manifestations and effects of the infestation and the longevity of it. When confirmed, the sure conclusion follows: "This person is most certainly not rightly baptized."<sup>34</sup>

Finally, written documents can also serve as an important element of proof when investigating doubtful baptisms. These documents, however, should provide certain proof and themselves be above suspicion.<sup>35</sup> For instance, if an official notary intends to issue a public document but fails to seal or sign it, the document becomes private by nature and lacks probative value.<sup>36</sup> Similarly, not every document that attests to the administration of baptism is worthy of belief, even if it is meant to serve as official notice. It, too, would be taken as a private document and so deficient for proof, if it lacked the required seal and signature. Although not pertinent to Nathalie's case, Schmalzgrueber mentions that even babies who are left abandoned at Catholic churches or homes, but who have written notice on them that baptism took place, are to be conditionally baptized. Quintanadueñas offers a thorough discussion of this question.<sup>37</sup> He concludes that the written attestation hung about a baby's neck is not a public document and so not probative of the baptism. He adds that most likely a parent who would leave a child abandoned would not have been educated in the ways of administering baptism to the child. Thus, conditional baptism should always occur in such cases. We see here once more the principle at play that rebaptism always takes place when moral certitude cannot be reached regarding the fact or manner of a prior baptism.

<sup>34</sup> "Der Mensch ist gewiß nicht recht getauft." SCHMALZGRUEBER, *Consilia*, n. 12, citing GOBAT, who writes: "Confirmatur iudicio longe plurimorum, qui, quando vident, quempiam diu, multumque infestari modis exoticis, solent dicere: Der Mensch ist gewiß nicht recht getauft." GOBAT, *Experimentalis theologiae*, n. 384. This is the only place in this *Consilium* where Schmalzgrueber uses the German language. Like Gobat, he immediately follows it with the Latin, "Iste homo certo non est rite baptizatus," which lacks some of the emphasis of the German on the certainty of the matter. In a majority of the other *consilia*, the use of German is far more frequent (if not almost exclusive in some) and commonly without Latin translation.

<sup>35</sup> SCHMALZGRUEBER, *Consilia*, n. 17.

<sup>36</sup> "Extende, vt procedat etiam in scriptura Notarii; quia dicitur privata, quando non habet solemnia iuris." DOMENICO TOSCHI, *Practicarum conclusionum juris*, vol. 7, Francofurti: Erasmi Kempsseri, 1623, v. *Scriptura*; conc. 76, n. 11. Toschi's extraordinary work, which arranges topics treated in alphabetical order, provides dozens of authors who treat the various questions associated with documents and their legal effect and importance.

<sup>37</sup> QUINTANADUEÑAS, *Singularia theologiae moralis*, Tract. 1, Sing. 9.

### 3 — *The Resolution of Nathalie's Petition for Rebaptism*

How does Schmalzgrueber apply this general doctrine on rebaptism to Nathalie's case? If what Nathalie asserts is true, then there would be no doubt that rebaptism is necessary. But her statements alone cannot be sufficient to allow that conclusion. They must instead be considered and weighed individually and together, considering all the evidence available. This is so even though, as Schmalzgrueber notes, Nathalie appears to lead an honest life, have a good reputation, and is not given to extreme behavior or bouts of hypochondria.<sup>38</sup>

Nathalie first claims that the preacher who baptized her did so in the name of the Devil because he was a wizard. As such, he would neither have intended what the Church requires for a valid baptism nor used the proper Trinitarian formula when administering the sacrament. Nathalie's aunt, moreover, had been present at the ceremony. She asserts repeatedly that the preacher did baptize the girl in the name of the Devil instead of the Holy Trinity. This was supposedly done precisely because he was a wizard. Further investigation establishes that he had been removed from his position and forced to leave the place due to his reputation for an infamous and shameful lifestyle. If this did arise, even in part, due to his having dedicated himself to Venus, then he is suspect of practicing magic, since the name Venus and the term sorcerous magic (*veneficia*) are intertwined, especially if the person engaged in the magic is also a heretic (as the preacher would have been considered in any case).<sup>39</sup>

To emphasize this last point, that if the preacher were a heretic, he was also more likely a wizard, Schmalzgrueber offers a citation to the prologue of an influential work on witchcraft and sorcery by the Jesuit Martin Del Rio (1551-1608), the *Disquisitiones magicarum*.<sup>40</sup> Del Rio proposes five reasons why demons are most associated with heretics.<sup>41</sup> Demons used to dwell in

<sup>38</sup> SCHMALZGRUEBER, *Consilia*, n. 19.

<sup>39</sup> As Schmalzgrueber puts it: "Nam Venus, et veneficia fati vicina, ut nomine, ita et re delicta sunt, praesertim in homine Haeretico." *Consilia*, n. 20.

<sup>40</sup> MARTIN DEL RIO, *Disquisitionum magicarum libri sex*, Moguntiae, Petri Henningii, 1624. The *Disquisitionum* was first published in 1599 and 1600 in three volumes. It remained highly influential and widely popular for over two centuries after its first appearance and went through numerous subsequent printings during that time.

<sup>41</sup> Del Rio adopts them, as he says, from lectures delivered in Paris by his younger fellow Jesuit, Johannes Maldonatus (1534-1583), a celebrated Spanish theologian best known for his commentaries on the four Gospels. Maldonatus also wrote a treatise on angels and demons, published after his death in a French translation: *Traicté des anges et demons*, Rouen, Jacques Besongne, 1616. This work is divided into two treatises, the first on angels



idols, but now they inhabit heretics, especially when forced out of one group such that they run to another. Heresy itself, although violent, cannot remain stable and endure; only the truth can do that. So as heresy degenerates, it changes into the practice of the magical arts (*magicas artes*) or engrained atheism. Various elaborate arts also follow upon heresy when the demons use heretics, as if beautiful prostitutes (*quasi formosis meretricibus*), to lure others into embracing the heresy. Finally, the negligence of those who govern the Church—especially with a failure to preach the word of God—allows the heretics and their magical practices to reach a broader audience and with more effect.

A second cause of doubt regarding Nathalie's baptism arises from the actions of the current Lutheran preacher of the place where Nathalie had been baptized. He is the immediate successor to the alleged sorcerer who baptized her. He was asked to provide proof of the baptism, including a list of persons who would have witnessed it. Instead of providing the requested information, he vacillated in his responses, stating at first that he could send no such documentation since Nathalie's name had been deleted from the register. Yet, the next day he sent a letter that included Nathalie's name, the names of her parents, godparents, her father's parents, and the name of his predecessor as preacher. But the document failed to indicate the day and year of the baptism, and no seal was placed on it. This calls into question the authenticity of the document and so the validity of the baptism itself. Moreover, the preacher loses credibility as a witness since he changes his testimony radically and without cause.

Nathalie further stated that her parents, godparents, brothers, and sisters were all themselves guilty of the crime of sorcery. In particular, she asserted that even though her father was a poor shepherd he was nonetheless most always drunk. To maintain this habit, he entered a pact with the Devil and accepted money from him. More troubling still, Nathalie asserted that the same father had confessed to her that she had been baptized in the name of the Devil and that at the age of five, and again at nine, he and her mother had dedicated her to the Devil. She had asked them in vain to spare her this fate and not to hand her over. Nathalie affirmed that because of this the Devil has full admittance to her, molesting her both day and night. This included

and the second on demons. In the prologue to the treatise on demons, Maldonatus lays out the five reasons why heretics are most often those persons engaged in the magical arts. "Pour moi je pense qu'il y a cinq causes pour lesquelles les arts magiques suivent l'hérésie" (p. 157). Maldonatus' text was published some years after Del Rio's *Disquisitiones*. Since he died in 1583, he was clearly lecturing on the subject well before his text appeared. Del Rio would have been a young scholar when he attended the Paris lectures of Maldonatus.

many nights when she would be awakened by terrifying demons. She had not, however, freely given herself to the demons. She wished, instead, to be free of them.

We have already seen that there are accepted, general presumptions concerning situations that almost always give rise to doubts about the conferral of baptism. One of these concerns children baptized by parents who practice witchcraft. If there are no sure indications as to when and how the child was rightly baptized, a presumption arises that the parents baptized their offspring (and servants) in the name of the Devil and consecrated them to him. Moreover, the same presumption holds for those who are consistently and gravely disturbed as children or adults by demons and ghosts, something apparently true about Nathalie. Absent sure proof to the contrary, a prudent suspicion or fear arises that they had not been baptized at all or that the sacrament had been invalidly administered.<sup>42</sup> This presumption can be so strong that it might apply also to the baptism of children born of devout parents.

By way of illustration, Schmalzgrueber describes a case reported by Gobat.<sup>43</sup> A boy was tormented by demons from infancy. Even when in his crib, the boy would shout out loud, move his head and eyes in odd ways and show other signs of serious molestation. He was already able to speak and continuously cried out that he was being terrified, even at night, by an ugly and offensive man. The Ordinary was approached. He authorized a conditional baptism of the now six-year-old child even though the parish priest, who was of proven character and evidently not given to drink, stated that he had baptized the boy. Once the second baptism took place, the boy ceased to see evil spirits and remained quiet and peaceful from that day forward.

Yet how could the Ordinary have arrived at reasonable doubt regarding the first baptism? The parish priest and the godparents all attested to it having taken place according to the manner prescribed for validity. It is precisely the supposed demonic molestation that led the Ordinary to doubt the first

<sup>42</sup> On the other hand, as we have seen, a vehement presumption also arises in favor of proper baptism for children born of devout parents who educated them in the faith. Still, this presumption can be overturned, even in cases where it concerns a person baptized as an adult. For, educated and pious persons who examine a given case can still differ on the question of the baptism's validity. If so, conditional baptism is to be conferred since reasonable doubts should lead to that end. Proof to the contrary, however, must be of the highest probative force. As Gobat holds, the presumption should be overturned only by *evidentissimis argumentis*: "De ille, qui natus est ex fidelibus parentibus, et inter Christianos fideliter conversatus, tam violenter praesumitur, quod fuerit baptizatus, ut hac praesumptio pro certitudine sit habenda, donec evidentissimis forsan argumentis cotrarium probetur." GÖBAT, *Experimentalis theologiae*, n. 383.

<sup>43</sup> Ibid., n. 453.

baptism. It had lasted some six years continuously. Moreover, the demonic infestations were of an extraordinary and very grave nature. The general presumption then arises that such a case of demonic influence can only have occurred if the original baptism had not been valid, thereby allowing an evil spirit or demon to do its work.<sup>44</sup> If conditional baptism was a justifiable conclusion under these circumstances, where the parents and priest were above suspicion, it must be even more justified when the parents are sorcerers or witches.

Nathalie was also gravely disturbed by the thought that her original baptism might have been invalid. As we have seen, when such torments are long lasting, conditional baptism might be a suitable response even when there is no indication of demonic activity. Quintanadueñas offers the case of a noble woman who suffered continuous, vehement doubt that her baptism was valid.<sup>45</sup> Yet there was little proof to support this. In fact, here too all indications were that her baptism had been validly administered. Should she receive conditional baptism?

Quintanadueñas admits that the experts he consulted all would oppose her rebaptism since it would harm the sacrament more than benefit her.<sup>46</sup> When there is only slight doubt, no rebaptism should be allowed. Quintanadueñas disagrees, and Schmalzgrueber supports him. The woman suffered for years from severe scruples about the validity of her baptism. They caused her untold anxiety, grief, and torment. She had approached many wise and learned persons to alleviate her doubts. None of them were able to do so. Quintanadueñas concludes that the severity of her scruples, and their long-standing, negative impact on her, are sufficient to establish adequate doubt about the original baptism. Moreover, decisions should generally be made for the good of souls, “especially with those things that regard baptism, inasmuch as it is necessary for salvation.”<sup>47</sup> Rebaptism would also provide the woman with internal consolation and a calm spirit, something Nathalie was seeking as well. For this and all the above reasons, Nathalie’s petition for rebaptism should be granted.

<sup>44</sup> Gobat notes further in another case concerning a child baptized but suffering from apparent demonic oppression. *Ibid.*, n. 456.

<sup>45</sup> QUINTANADUEÑAS, *Singularia theologiae moralis*, Tract. 1, Sing. 8; SCHMALZGRUEBER, *Consilia*, n. 14.

<sup>46</sup> He cites no specific authors, but states simply: “Viros doctos hac de re consului, omnes fere baptismi iterationem, etiam conditionalem in hoc casu denegandum docebant.” QUINTANADUEÑAS, *Singularia theologiae moralis*, Tract. 1, Sing. 8, n. 2.

<sup>47</sup> “Fundamentum secundum est quia in casibus occurrentibus, dum peccatum non interveniat, semper inclinandum est in favorem animarum et praecipua in iis quae ad baptismum conducunt, utpote ad salute ita necessarium.” *Ibid.*, Sing. 1, Tract. 8, n. 4.

Once Schmalzgrueber concludes that Nathalie should receive conditional baptism, he concludes the 73<sup>rd</sup> *Consilium* with a brief discussion of several issues related to the circumstances of her case but not bearing directly on the question of rebaptism.<sup>48</sup> They are worth mentioning here, if mostly to provide context to the primary question of the *Consilium*. The first issue concerns whether Nathalie should receive the Sacrament of Penance prior to her second, conditional baptism taking place. This was an often-raised question prior to Schmalzgrueber, and one that received a similar answer as his. The second baptism is conditional. Its efficacy depends on the first baptism not having been validly administered. If there had been a first, valid baptism, then the second one would have no effect at all. Sacramental confession is thus warranted if at least venial sins had been committed after the first baptism. Hence, Nathalie should go to confession prior to the second baptism and to reception of Holy Communion.

A second issue concerns a practice that Schmalzgrueber indicates was common among those who were handed over to the Devil and were later set free. This involved placing particles of the Sacred Species or other superstitious items in their bodies.<sup>49</sup> Should Nathalie remove these objects or ask a surgeon to do so? She is certainly obligated to do so if she is able on her own. For if the objects remain in her, the demonic influence might return. Interestingly, however, if Nathalie cannot remove them without the assistance of a surgeon, then she might not be obliged to act. This is because she cannot be compelled to reveal herself to another if it would result in defamation to her own reputation. The surgeon might make others aware of her past and current situation.<sup>50</sup> In this case, Nathalie is not obliged to remove the items but should wear a sacred medal to ward off any influences of evil spirits.<sup>51</sup>

Finally, there remains the question of whether Nathalie is required to denounce her parents, siblings, and anyone else complicit in consorting with demons. Here, too, she has no obligation if this would mean that she would betray herself at the same time. Following the principle of law that no one

<sup>48</sup> SCHMALZGRUEBER, *Consilia*, nn. 22-26.

<sup>49</sup> “Particulas Sacras, vel alia superstitiosa, si quae corpori inserta gerit, ut plerumque fit apud homines Diabolo traditos, et mancipatos.” Ibid., n. 22.

<sup>50</sup> Were this to occur, Nathalie herself might be charged with a crime or become suspect of heresy.

<sup>51</sup> Schmalzgrueber notes that the particles of hosts removed from bodies were not always consecrated species. At times, they were hosts taken from Lutheran churches. Given that it is not easy to determine whether the hosts removed were consecrated, any particle was to be dissolved in water or burnt. The water or ashes would then be disposed of properly. *Consilia*, n. 25.

is bound to denounce himself, especially if it might mean capital punishment could result, it is enough for Nathalie to renounce sincerely the demons that once held her, repent of the sins she had committed, and have a firm commitment to live a better life. To the extent that she is able, she should also exhort her parents and siblings to cease from their association with the evil spirits and to amend their own lives. To this can be added threats that she will denounce them if they fail to do so.

### *Conclusion*

#### *The Contemporary Relevance of Consilium LXXIII*

The fundamental discipline and applicable law on rebaptism remain the same as in Schmalzgrueber's time.<sup>52</sup> Baptism once validly administered is not to be repeated. Should reasonable doubt arise regarding the original conferral, a serious investigation ensues. Infants who have been abandoned are to be baptized unless a diligent investigation establishes that a valid baptism had taken place.<sup>53</sup> If reasonable doubt remains after such investigations, conditional baptism takes place. If there is no doubt that baptism was never administered, an absolute baptism follows.

Although this canonical doctrine has remained substantially consistent over time, the availability of contemporary literature on the subject remains uncommon even though the text of the current canon 869 is a notable expansion of the parallel canon of the 1917 Code.<sup>54</sup> This includes the topic of what constitutes reasonable doubt and whether an inconclusive decision concerning rebaptism should benefit the subject rather than the sacrament. The historical case study presented here can offer principles to guide investigations

<sup>52</sup> Canon 869 § 1. Si dubitetur num quis baptizatus fuerit, aut baptismus valide collatus fuerit, dubio quidem post seriam investigationem permanente, baptismus eidem sub conditione conferatur. § 2. Baptizati in communitate ecclesiali non catholica non sunt sub conditione baptizandi, nisi, inspecta materia et verborum forma in baptismo collato adhibitis necnon attenta intentione baptizati adulti et ministri baptizantis, seria ratio adsit de baptismi validitate dubitandi. § 3. Quod si, in casibus de quibus in §§ 1 et 2, dubia remaneat baptismi collatio aut validitas, baptismus ne conferatur nisi postquam baptizando, si sit adultus, doctrina de baptismi sacramento exponatur, atque eidem aut, si de infante agitur, eius parentibus rationes dubiae validitatis baptismi celebrati declarentur.

<sup>53</sup> Canon 870. Infans expositus aut inventus, nisi re diligenter investigata de eius baptismo constet, baptizetur.

<sup>54</sup> *CIC/17* canon 732 § 2 read simply, "Si vero prudens dubium existat num revera vel num valide collata fuerint, sub conditione iterum conferantur."

into doubtful baptisms and how to reach a decision on whether conditional or absolute baptism should follow.

An investigation will include, when possible, statements from the original minister and witnesses to the baptism; examination of available public documents, most especially official notifications of baptism; and consideration all other available proof (including circumstances) related to the baptism and the one baptized. Consultation with the appropriate ecclesiastical superior and those expert in the matter will also prudently take place, especially if resolution of the case presents difficulties. In urgent situations, such as serious illness or danger of death of the one whose baptism is doubtful, baptism should take place as soon as possible.

Importantly, the investigation should not simply lessen the reasonable doubt; rather, moral certitude regarding the validity of an original baptism needs to arise. The investigation should lead to a positive evaluation, not a negative one. This means that if the investigation results in a conclusion that the validity of a first baptism is more likely than not, conditional baptism is merited. Probability is not sufficient given the significance of baptism for an individual doubtfully baptized.

Schmalzgrueber excels in his consideration of the subjective elements related to the one doubtfully baptized. The person's character, including his or her spiritual state, education, and upbringing all inform (to some degree) the decision to rebaptize. If the uncertainty of valid baptism leaves a person in a continued state of unease or anxiety, conditional baptism might be warranted to relieve those serious aggravations. This could be the case even if the doubts regarding the original baptism are slight. It is not clear from Schmalzgrueber's text if some degree of true doubt, however slight, would still be needed for rebaptism to occur. Or would doubt born of merely hypothetical or imagined circumstances suffice if the rebaptism would alleviate a person's negative, subjective state? We can reasonably conclude that Schmalzgrueber holds that the benefit to the person always outweighs the possible harm to the sacrament. He does not speak to issues relevant to the current time, such as the possible scandal or harm that might arise if rebaptism is too readily granted to members of non-Catholic Christian denominations.<sup>55</sup>

<sup>55</sup> See, for instance, PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY, *Directory for the Application of the Principles and Norms on Ecumenism*, 25 March 1993, in *AAS*, 85 (1993), 1039-1119, nn. 92-95, especially n. 94 which encourages Churches and ecclesial communities to develop common statements on baptism, including "procedures for considering cases in which a doubt may arise as to the validity of a particular baptism."

As in every age of the Church, doubts regarding the fact of a person's baptism, or its valid administration, occur today. These will far less frequently concern the wizards, magic, or demonic influences Schmalzgrueber encountered. Most commonly, doubts now concern the conferral of baptism by a non-Catholic minister. There may be no proof of the baptism, including witnesses to it, or concerns might arise regarding the form used. The resolution of Nathalie's petition for rebaptism offers us not only a glimpse into the lively mind and systematic method of one of the greatest canonists of the early modern period, but it also leaves us with principles employed then that are applicable in their own way to cases of doubtful baptism today.

## CELERITY OF MARRIAGE NULLITY PROCESSES AND THE MANDATORY REVIEW OF JUDGMENTS DECLARING THE NULLITY OF A MARRIAGE

WOJCIECH KOWAL

**SUMMARY** — The article addresses the rationale behind the reform of the judicial proceedings in marriage nullity cases brought about by the *motu proprio Mitis Iudex Dominus Iesus*, specifically the suppression of the requirement of the obligatory review by appeal tribunals of all judgments which first declared the nullity of a marriage. The article critically analyses the obligatory review in its historical development, starting with the unique experience of tribunals in the United States, through the process of the revision of the Code of Canon Law, and the most recent developments leading to the promulgation of *Mitis Iudex*. This reflection serves to determine some epistemological consequences of the choices made in drafting *Mitis Iudex* which may bear on the correctness of judicial pronouncements and subsequent pastoral action.

**RÉSUMÉ** — L'article traite de la raison d'être de la réforme de la procédure judiciaire dans les cas de nullité de mariage, réforme introduite par le *motu proprio Mitis Iudex Dominus Iesus*, en particulier la suppression de l'exigence de la révision obligatoire par les tribunaux d'appel de tous les jugements qui ont déclaré en premier la nullité d'un mariage. L'article analyse de manière critique la révision obligatoire dans son développement historique, en commençant par l'expérience unique des tribunaux des États-Unis, en passant par le processus de révision du Code de droit canonique, et les développements les plus récents qui ont conduit à la promulgation de *Mitis Iudex*. Cette réflexion sert à déterminer certaines conséquences épistémologiques des choix effectués lors de la rédaction de *Mitis Iudex*, qui peuvent avoir une incidence sur la justesse des prononcés judiciaires et de l'action pastorale ultérieure.



## *Introduction*

The six years that have passed since the promulgation of the *motu proprio Mitis Iudex Dominus Iesus*<sup>1</sup> offer a sufficient perspective for reflecting on certain aspects of the new procedural law concerning marriage nullity cases. Soon after the promulgation of *Mitis Iudex*, numerous commentaries appeared in canonical periodicals.<sup>2</sup> The present article does not intend an overall evaluation of the new legislation; its purpose is to address some consequences of the choices made in drafting the new law, and in particular, the suppression of the obligatory review by an appeal tribunal, of all judgments which have first declared the nullity of a marriage.<sup>3</sup> This decision of the supreme legislator received great attention from canonists, with some calling it “[t]he most profound modification internal to the ordinary contentious process for causes of nullity of marriage [...] the derogation of the requirement of a double conformity of sentences from the general legislation governing the marriage nullity process.”<sup>4</sup>

It is the conviction of this author that any new legislation should not only respond to the demands of ecclesial life but also represent progress in the development of canonical doctrine. This article will address this question, albeit in a very specific perspective.

<sup>1</sup> FRANCIS, Apostolic Letter *Motu Proprio* on the Reform of Canonical Procedure for the Declaration of Nullity of Marriage *Mitis Iudex Dominus Iesus*, 15 August 2015 in AAS, 107 (2015), 958–970 (= *Mitis Iudex*), English translation in *The Canadian Canon Law Society Newsletter* (= CCLSN), vol. 37, no. 2 (2015), 50–65. In limiting the reflection to the *motu proprio Mitis Iudex*, I rely on this “disclaimer” of the late Fr. Francis Morrissey, OMI, member of Special Commission for the Study of the Reform of the Matrimonial Processes in Canon Law: “To keep matters relatively simple, I am referring here solely to the *motu proprio* applicable to the Latin Church, although both texts are parallel in their thrust” (“Some Practical Implications of the New *Motu Proprios* on Marriage Nullity Procedures,” in *The Canadian Canon Law Society Newsletter*, vol. 37, no. 2 [2015], 10).

<sup>2</sup> One can mention here a series of articles published in *J*, 75 (2015) and 76 (2016).

<sup>3</sup> The mandatory review concerned all judgments which have first declared the nullity of a marriage. However, to avoid a certain awkwardness of repeating this phrase in its entirety when not essential for the clarity of discourse, some shorter phrases, “mandatory appeal of affirmative judgments,” “mandatory review of sentences” and the like, as dictated by the context, will be used.

<sup>4</sup> W.L. DANIEL, “An Analysis of Pope Francis’ 2015 Reform of the General Legislation Governing Causes of Nullity of Marriage,” in *J*, 75 (2015), 450. There is, however, a formal difference between a double conformity of sentences considered as the requirement for a party to exercise his/her right to marry and the strictly procedural norm of having the judgment first declaring the nullity of a marriage reviewed by the appeal tribunal.

## 1 — *The Rationale behind the Reform of Juridical Proceedings in Marriage Nullity Cases*

*Mitis Iudex Dominus Iesus* stresses the supreme law of the salvation of souls, and consequently, the aim of all Church's institutions "[...] to transmit divine grace, and each, by its own function, [...] to favour the good of Christ's faithful, which is the essential purpose of the Church itself."<sup>5</sup> Pope Francis reveals that he felt "impelled" to introduce a reform to protect "[...] the unity of faith and discipline regarding marriage, the cornerstone and origin of the Christian family."<sup>6</sup> There was also a more practical reason, namely "[...] the enormous number of faithful who, while wishing to act according to their consciences, are too often separated from the legal structures of the Church due to physical or moral distance; charity and mercy therefore require that same Church, as a mother, to make herself closer to her children who consider themselves separated."<sup>7</sup> That situation was reported by "[...] the votes of the majority of our brothers in the episcopate, gathered in the recent extraordinary synod, who implored more flexible and accessible judicial processes."<sup>8</sup>

In the judgment of Pope Francis, the structures of matrimonial trials needed reform for the good of souls. To dispel wonderment about the goal of introducing the revision of the law, Pope Francis stated that the newly introduced norms "[...] favour not the nullity of marriage but rather the speed of the processes, along with the appropriate simplicity, so that the heart of the faithful who await clarification of their status is not long oppressed by the darkness of doubt due to the lengthy wait for a conclusion."<sup>9</sup>

The aims of the reform were duly noted by commentators. William Daniel states: "The chief guiding principles that seem to have motivated the reform enacted by Pope Francis are three: 1) the principle of the celerity of the process, 2) the principle of the protection of the indissolubility of marriage, and 3) the principle of proximity between the judge and the parties."<sup>10</sup> He concludes that the celerity of the process "[...] is in fact *the* [emphasis

<sup>5</sup> *Mitis Iudex*, in AAS, 107 (2015), 958, CCLSN, 50.

<sup>6</sup> *Ibid.*, in AAS, 107 (2015), 959, CCLSN, 51.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* Cf. III EXTRAORDINARY GENERAL ASSEMBLY OF THE SYNOD OF BISHOPS, The Pastoral Challenges of the Family in the Context of Evangelization *Relatio Synodii*, no. 48, Vatican City, 2014, [https://www.vatican.va/roman\\_curia/synod/documents/rc\\_synod\\_doc\\_20141018\\_relatio-synodi-familia\\_en.html](https://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20141018_relatio-synodi-familia_en.html) (21 June 2021).

<sup>9</sup> *Mitis Iudex*, in AAS, 107 (2015), 959, CCLSN, 51.

<sup>10</sup> DANIEL, "An Analysis of Pope Francis' 2015 Reform of the General Legislation Governing Causes of Nullity of Marriage," 437.

in original] guiding principle of the reform”<sup>11</sup> and “[...] the *favor matrimonii* seems to have been subordinated to the *favor celeritatis*.”<sup>12</sup>

In the Preamble to the canons of *Mitis Iudex* are “[...] some fundamental criteria which have governed the work of reform: I. A single executory sentence in favour of nullity. It seemed appropriate, in the first place, that there is no longer required a double conforming decision declaring the nullity of the marriage to enable the parties to be able to contract a new canonical marriage. Instead, moral certainty, reached by the first judge under the norm of law, is considered sufficient.”<sup>13</sup> As the text indicates, this change is the primary one: “It seemed appropriate, in the first place (*imprimis*) [...]”<sup>14</sup> No explanation as to why it was appropriate and to whom it appeared as such (the special committee members?) was given. However, it could be that this was meant to incorporate into the law the desire of some synodal fathers.

48. A great number of synod fathers<sup>15</sup> emphasized the need to make the procedure in cases of nullity more accessible and less time-consuming, and, if possible, at no expense. They proposed, among others, the dispensation of the requirement of second instance for confirming sentences; the possibility of establishing an administrative means under the jurisdiction of the diocesan bishop; and a simple process to be used in cases where nullity is clearly evident. Some synod fathers, however, were opposed to these proposals, because they felt that they would not guarantee a reliable judgment. In all these cases, the synod fathers emphasized the primary character of ascertaining the truth about the validity of the marriage bond.<sup>16</sup>

However, the Holy Father seems aware that the new legislation might give the impression that the law goes too far in accommodating the call for the celerity of the marriage nullity process, if he deigned to mention fears, rather unthinkable among scholars of canon law, that a canonical procedure might ever be conceived in the way to predetermine a desirable outcome of the process; in this case the declaration of nullity of a marriage: the new “[...] provisions [...] favour not the nullity of marriage but rather the speed of the processes, along with the appropriate simplicity [...]”<sup>17</sup> Here, the

<sup>11</sup> Ibid., 438.

<sup>12</sup> Ibid., 446.

<sup>13</sup> *Mitis Iudex*, in AAS, 107 (2015), 959, CCLSN, 51.

<sup>14</sup> Ibid.

<sup>15</sup> The vote was 143-35.

<sup>16</sup> III EXTRAORDINARY GENERAL ASSEMBLY OF THE SYNOD OF BISHOPS, *Relatio Synodii*, [https://www.vatican.va/roman\\_curia/synod/documents/rc\\_synod\\_doc\\_20141018\\_relatio-synodi-familia\\_en.html](https://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20141018_relatio-synodi-familia_en.html) (21 June 2021).

<sup>17</sup> “[...] dispositiones [...] quibus non matrimoniorum nullitati, sed processuum celeritati faveatur non minus quam iustae simplicitati [...]” (*Mitis Iudex*, in AAS, 107 [2015], 959, CCLSN, 51).

phrase “favour not the nullity of marriage” must be understood to mean that the new procedure is not aimed at facilitating one desirable outcome, i.e., reversing the favour of law that the marriage bond enjoys (canon 1060) but at discovering the truth.<sup>18</sup> This understanding is necessary to maintain the coherence of the legal system. Nullity is a state of affairs and it is difficult to understand how a procedure might favour it, unless a certain ellipsis is used in the expression itself. Therefore, since “[...] the purpose of the [marriage nullity] proceedings is the declaration of the truth by an impartial third party [...],”<sup>19</sup> the procedure is to “favour” the truth of the matter, which is an overriding principle when confronted with the celerity of the procedure or any other functional aspect of it.

Concern about adherence to the truth is especially urgent today. Clearly, the ecclesiastical legal system serves concrete, practical purposes. Nevertheless, as any other legal system that is subject to scientific enquiry, it must strike a neat balance between the demands of legal theory and the realities of social life. Certain compromises seem inevitable, but compromises of what kind?

Pope John Paul II called the process of arriving at moral certainty “[...] the most demanding and delicate phase of the trial.”<sup>20</sup> For in judicial proceedings the truth of the fact cannot always be determined by direct proof, but it is rather a conclusion reached through the process of reasoning based on some external information.<sup>21</sup> An independent evaluation of the process leading towards the judge’s conviction about the nullity of a marriage was assured, at least in

<sup>18</sup> The Church’s legal system is designed in such a way as to preserve its own stability by recognizing the principle of the presumption of the validity of juridical acts performed correctly with respect to their external elements (see canon 124 §2); the principle has its particular application in procedural law that states in canon 1608 §4 that a judge who was not able to arrive at moral certitude about the matter to be decided by the sentence is to pronounce that the right of the petitioner is not established and, consequently, in a case of the alleged nullity of a marriage, he is to pronounce in favor of the validity of marriage (see canon 1060).

<sup>19</sup> BENEDICT XVI, allocution to the Roman Rota, 28 January 2006, in AAS, 98 (2006), 136, English translation in W.H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939–2002*, Ottawa, Faculty of Canon Law, Saint Paul University, 2011, 290.

<sup>20</sup> JOHN PAUL II, allocution to the Roman Rota, 4 February 1980, no. 5, in AAS, 72 (1980), 175, English translation in WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939–2002*, 161.

<sup>21</sup> See C. DE DIEGO-LORA, “Title VII – The Pronouncements of the Judge,” in E. CAPARROS, M. THÉRIAULT, and J. THORN (eds.), *Code of Canon Law Annotated*, 2<sup>nd</sup> ed. revised and updated of the 6<sup>th</sup> Spanish-language ed., prepared under the responsibility of the INSTITUTO MARTÍN DE AZPILCUETA, Montréal, Wilson & Lafleur Limitée, 2004, 995. For an attempt to present the patterns of logical operations leading towards moral certainty, see W. KOWAL, “Moral Certainty and Truth Justification,” in *J*, 65 (2005), 146–180.

principle, by the obligatory review of all sentences first declaring the nullity of a marriage. This examination served, in a certain sense, as a double-check of what was decided in a prior instance. However, this element of the procedure was subject to constant criticism in canonical circles.

## **2 — The Experience of the Church in the United States The American Procedural Norms**

We will focus on the unique experience of the Church and ecclesiastical tribunals in the United States as the ecclesiastical milieu where new possibilities were created and tested, with the accompanying discussion in academic and canonical circles, benefitting from the firsthand experience with a procedural novelty introduced in 1970. This in turn will help to look at the controversy on the mandatory review of marriage nullity sentences through the lenses of American canonists.

Canon 1986 of the 1917 Code stipulated that the defender of the bond was to appeal to the higher tribunal, within the time laid down by the law, the first sentence that declared the nullity of a marriage. If he neglected to do so, he was to be compelled by the judge.<sup>22</sup> The motu proprio *Causas matrimoniales*, in no. VIII, § 1 upheld this obligation.<sup>23</sup> In § 3, the new law provided the college of judges of higher instance with the choice of either ratifying the affirmative decision of first instance by a decree, or admitting the case to an ordinary examination in second instance.<sup>24</sup>

<sup>22</sup> “Canon 1986. A prima sententia, quae matrimonii nullitatem declaraverit, vinculi defensor, intra legitimum tempus, ad superius tribunal provocare debet; et si negligat officium suum implere, compellatur auctoritate iudicis,” in *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papæ XV auctoritate promulgatus*, Typis polyglottis Vaticanis, 1917.

<sup>23</sup> “VIII. § 1. The defender of the bond is obliged to appeal to the higher tribunal, within the time laid down by law, against a first sentence declaring the nullity of a marriage. If he fails to do this, he shall be compelled to do so by the authority of the president or the sole judge” (PAUL VI, Apostolic Letter Motu Proprio Determining Norms for Expediting Marriage Cases *Causas matrimoniales*, 28 March 1971, in *AAS*, 63 [1971], 444, English translation in *J*, 31 [1971], 670).

<sup>24</sup> “§ 3. Having examined the sentence and having considered the observations of the defender of the bond and, if they were asked for and given, those of the parties or of their advocates, the college by its decree shall either ratify the decision of the first instance, or admit the case to the ordinary examination of the second instance. In the first of the two cases, if no one makes recourse, the couple, provided there is no other impediment, have the right to contract a new marriage after ten days have elapsed from the publication of the decree” (ibid., in *J*, 31 [1971], 670–671).

However, the American Procedural Norms (APN),<sup>25</sup> in no. 23, §2 brought in, as Thomas Green opined, “[...] the most significant procedural law innovation in marriage cases.”<sup>26</sup>

In those exceptional cases where in the judgment of the defender of the bond and his Ordinary an appeal against an affirmative decision would clearly be superfluous, the Ordinary may himself request of the Episcopal Conference that in these individual cases the defender of the bond be dispensed from the obligation to appeal so that the sentence of the first instance may be executed immediately.<sup>27</sup>

It is striking that Green observed that Norm 23, §2 “[...] assumes that theoretically the mandatory appeal is the rule and the waiver the exception despite the fact that in practice it has been just the opposite. It has clearly been the most significant provision of the APN in expediting the processing of marriage cases in the United States.”<sup>28</sup> This frank admission points to the predominant direction in interpreting the opening clause of Norm 23, §2, *in casibus exceptionalibus*. This has been noticed by the Roman authorities and dealt with in the revision of the Code of Canon Law.

In the meantime, on 28 April 1971, the Canadian Catholic Conference of Bishops asked for “[...] the waiver of the appeal when the defender conscientiously judged that the sacredness of the bond had been preserved and the exigencies of justice fulfilled in a declaration of nullity.”<sup>29</sup> The Council for the Public Affairs of the Church initially denied the request in its response of 15 May 1972;<sup>30</sup> however, a rescript of the Council, dated 1 November 1974, authorized a waiver of the appeal for the Canadian and Australian conferences of bishops but under several conditions: it was to be applied “in exceptional cases if grave circumstances truly require it”<sup>31</sup> and only after a

<sup>25</sup> Normae concessae Conferentiae Episcopali Statuum Foederatorum Americae Septentrionalis, 28 April 1970, in I. GORDON and Z. GROCHOLEWSKI (eds.), *Documenta recentiora circa rem matrimoniallem et processualem*, Rome, Pontificia Universitas Gregoriana, 1977, 248–252, English translation 244–248.

<sup>26</sup> T.J. GREEN, “Marriage Nullity Procedures in the Schema *De processibus*,” in *J*, 38 (1978), 358.

<sup>27</sup> §2 (De appellacione vinculi defensoris) “In casibus exceptionalibus, in quibus iudicio vinculi Defensoris et Ordinarii, appellatio a sententia affirmativa sit aperte superflua, Ordinarius poterit ipse postulare ab Episcopali Conferentia, ut in istis casibus individualibus vinculi Defensor exoneretur ab obligatione appellandi ita ut sententia prioris instantiae statim possit executioni mandari” (GORDON and GROCHOLEWSKI [eds.], *Documenta recentiora circa rem matrimoniallem et processualem*, 251–252, English translation 247–248).

<sup>28</sup> GREEN, “Marriage Nullity Procedures in the Schema *De processibus*,” 358.

<sup>29</sup> *Ibid.*, 360.

<sup>30</sup> See *Canon Law Digest*, vol. 7, Chicago, IL, Canon Law Digest, 1975, 999–1001.

<sup>31</sup> “[...] in casibus exceptionalibus, si gravia adiuncta id revera requirant” (J. [card.] VILLOT, Rescriptum pontificium quo Conferentiae Episcoporum Canadensi et Australianae facultates

collegiate decision in first instance. Moreover, a committee of the members of the conference or one of its members was to implement this faculty.<sup>32</sup>

Canon 347 of the *Schema canonum de modo procedendi pro tutela iurium seu de processibus*<sup>33</sup> kept the mandatory appeal but provided for the possibility of a ratification of a first instance affirmative decision without the ordinary second instance process. The draft of the canon did not meet with approval of a sizable portion of American canonists. It seems that the most controversial procedural issue was the mandatory appeal of affirmative first instance decisions showing “[...] the conflict of values of different approaches [...] and] a significant difference of perspective between the majority of American bishops and tribunal personnel and the officials of the Holy See.”<sup>34</sup> Green offers the following assessment of the key points of the discussion on the mandatory appeal.

As might be expected, a significant part of the discussion on procedural law reform concerns the mandatory appeal of the defender against an affirmative judgment in first instance (canon 1986/*Provida Mater* 212, 2). Some authors have discussed the issue at length whereas others have simply proposed possible legal changes. A key issue underlying the discussion is reconciling at least two values: the avoiding of needless delays in the expediting of cases and the appropriate protection of the bond of marriage. As has been true before, the general lines of the discussion can be articulated well in terms of Gordon’s outline.<sup>35</sup>

quaedam tribuuntur circa processus instruendos in causis matrimonialibus, 1 November 1974, in GORDON and GROCHOLEWSKI [eds.], *Documenta recentiora circa rem matrimonialem et processualem*, no. 1460, 260).

<sup>32</sup> See GREEN, “Marriage Nullity Procedures in the Schema *De processibus*,” 360.

<sup>33</sup> See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Schema canonum de modo procedendi pro tutela iurium seu de processibus*, Typis polyglottis Vaticanis, 1976, canon 347 (*CIC* 1986 et 1989): “§ 1. A sententia, matrimonii nullitatem primum declarante, vinculi defensor appellare debet intra legitimum tempus; quod si facere negligat, acta transmittantur ex officio, auctoritate praesidis, ad tribunal appellationis ad normam can. 290, et ad ulteriora procedatur, tanquam si appellatio a vinculi defensore proposita sit. § 2. Vinculi defensor apud tribunal appellationis non potest appellationi adversus primam sententiam, quae matrimonii nullità tem declaraverit, renunciare; quamprimum autem, accurate perpensis actis, debet scripto declarare utrum contra sententiam impugnata quidpiam opponendum habeat necne. § 3. Perpensis animadversionibus defensoris vinculi, de quibus in § 2, et, si qua sit, partis appellantis, collegium suo decreto vel decisionem impugnata continenter confirmat vel ad ordinarium examen novi gradus causam admittit. § 4. Praescripta can. 308 servanda sunt, etiam si sententia, quae matrimonii nulli ta tem declaraverit, non altera sententia sed decreto confirmata sit.”

<sup>34</sup> GREEN, “Marriage Nullity Procedures in the Schema *De processibus*,” 381.

<sup>35</sup> *Ibid.*, 345. Green refers to a foundational article by I. GORDON, “De nimia procesuum matrimonialium duratione: factum, causae, remedia,” in *Periodica de re canonica*, 58 (1969),

In Green's estimation, American canonists generally opted for restricting the process to one instance, while European canonists mostly called for "[...] some types of process in second instance [...], even though they differ[ed] regarding the shape of the second instance process."<sup>36</sup> When presenting Ignatius Gordon's view, Green stressed his underestimation of "[...] the self-evident character of numerous declarations of nullity, particularly in cases with ample medical documentation"<sup>37</sup> and his attachment to "[...] a *contestatio* perspective on the nullity process,"<sup>38</sup> while North American parties, to whom divorce procedures were easily available, displayed no such attitude.<sup>39</sup> Other motives for elimination of the mandatory appeal had no direct connection with the question at stake: a conviction that "[...] the values of tribunal accountability and the protection of the bond are sufficiently realized in such a notable modification of traditional procedural law [restricting the process to one instance],"<sup>40</sup> or that "[...] the personal dignity and integrity of many defenders will be enhanced if the mandatory appeal were divorced from his duties."<sup>41</sup> Still others pointed to the newly promoted values of freedom and personal responsibility.<sup>42</sup> On the other hand, among the concrete canonical postulates, a proposal of excluding from the obligation of appeal all unanimous affirmative decisions issued in a first instance by a college of three or five judges was put forward.<sup>43</sup> Indeed, there seemed to be a consensus among the critics representing the Anglo-Saxon milieu that a waiver of the obligatory appeal of a unanimous collegiate decision declaring the nullity of a

491–594; 641–735. It is remarkable that Green's identification of the essential points of the discussion "[...] the avoiding of needless delays in the expediting of cases and the appropriate protection of the bond of marriage" corresponds to the goals of Pope Francis' reform.

<sup>36</sup> GREEN, "Marriage Nullity Procedures in the Schema *De processibus*," 346. On pages 346–348, Green summarized what was proposed in this regard. Some commentaries on APN: L. DEL AMO, "Procedimiento matrimonial canónico en experimentación," in *Lex Ecclesiae: Estudios en honor del Dr. Marcelino Cabrerós de Anta*, Salamanca, Universidad Pontificia, 1972, 461–542; T.J. GREEN, "The American Procedural Norms – an Assessment," in *SiC*, 8 (1974), 317–347; C. LEFEBVRE, "De procedura in causis matrimonialibus concessa conferentiae episcopali USA," in *Periodica de re canonica*, 59 (1970), 563–592; L. WRENN, "The American Procedural Norms," in *American Ecclesiastical Review*, 165 (1971), 175–186.

<sup>37</sup> GREEN, "Marriage Nullity Procedures in the Schema *De processibus*," 345, footnote 124.

<sup>38</sup> *Ibid.*

<sup>39</sup> See *ibid.*

<sup>40</sup> *Ibid.*, 346. This is rather an a priori acceptance of the proposed thesis on the basis of trust.

<sup>41</sup> S.J. KELLEHER, "Canon 1014 and American Culture," in *J*, 28 (1968), 5.

<sup>42</sup> See M. REINHARDT, "Updating the Marriage Tribunal," in *America*, 9 November 1968, 431.

<sup>43</sup> GREEN, "Marriage Nullity Procedures in the Schema *De processibus*," 346. Unlike the previous opinions, this is a solution which merited attention as based on a premise related to the procedure itself.



marriage would, although only partially, respond to concerns regarding the viability and effectiveness of the marriage tribunal system.<sup>44</sup>

From the pragmatic point of view, the obligatory appeal of affirmative decisions was singled out as the main cause of procedural delays, while the waiver was deemed to assure “[...] a swift and sure administration of justice.”<sup>45</sup> A doomsday scenario was foreseen if canon 347 of the 1976 Schema were to be retained in the future Code: “[i]t would seriously imperil if not entirely cripple a system that is beginning to work reasonably well but is still seriously inadequate in meeting a mounting caseload.”<sup>46</sup> The question of the consequences of the proposed norm for the tribunal system and all those involved—not only the tribunal personnel, but also parish priests and other pastoral agents and, ultimately, all the faithful—was therefore an important consideration.<sup>47</sup> An effective handling of marriage nullity cases was seen as a decisive factor in the clarification of the sacramental status of the faithful without long delays, especially when “[...] marital nullity was adequately demonstrated in first instance; it was unjust to require a second process when none of the parties involved including the defender desired such.”<sup>48</sup>

These are all valid considerations, although sometimes the conclusions on the impact of the proposed norm on ecclesial life were exaggerated as to their extent and specific consequences.

It appears that the discussion of the Schema led to some more open attitudes of the initial critics of canon 347. Green summarized that “[...] a major preoccupation of those favoring the mandatory appeal is ensuring tribunal accountability and precluding an irresponsible multiplication of annulments that would undercut the value of indissolubility.”<sup>49</sup> As to the work of the drafters of the new procedural law, Green remarked that “[...] the *coetus* response is hardly satisfactory. The *coetus* apparently believes that the value of tribunal accountability can be realized only through a second instance process however simplified. Its report indicates that numerous (*plura*) consultative organs sought the abolition of the mandatory appeal.”<sup>50</sup>

<sup>44</sup> Ibid.

<sup>45</sup> Ibid., 381.

<sup>46</sup> Ibid., 382. The tribunal system “[...] only recently has begun to function somewhat effectively, yet is still dealing only with a small percentage of potential cases” (T.J. GREEN, “The Revision of the Procedural Law Schema: Implications for Tribunal Practice,” in *J*, 40 [1980], 361). Cf. also D. BURNS, “Procedure in Second Instance Courts,” in *CLSA Proceedings*, 39 (1977), 112–310.

<sup>47</sup> GREEN, “The Revision of the Procedural Law Schema,” 361.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., 362.

<sup>50</sup> Ibid., 363.

An analysis of the deliberations in the *coetus*<sup>51</sup> indicates that the first question to be answered was “whether the sentence which has first declared the nullity of a marriage is to be subjected to a new examination (*utrum sententia matrimonii nullitatem primum declarante novo examini subicienda sit*).”<sup>52</sup> Almost all consulters (*fere omnes*) were in favour of this stipulation in view of eliminating, as far as humanely possible, any errors of judgment, especially because canon 24 of the Schema allowed, in cases of necessity, to entrust judicial trials to a sole judge. Dispensations from the obligatory second instance review, granted in particular cases, were not perceived as contributing to the celerity of the process. Moreover, the consultors thought that it would be impossible to assure that dispensations would be granted in a prudent and consistent way. The solution provided in *Causas matrimoniales* of confirming an affirmative sentence by a decree was deemed sufficient in order to shorten the time needed for processing cases.<sup>53</sup>

However, one consultor presented three objections to the institution of obligatory review. The first was of juridical order, namely that the institution of the mandatory appeal does not correspond to the mentality and legal ordering of some societies (the United States was mentioned in particular);<sup>54</sup> the second of pastoral nature, that judicial decisions should be rendered as swiftly as possible because they concern issues vital for the peace of conscience of numerous faithful; and the third, of the practical order, namely that a heavy burden would be placed on tribunals if the obligatory review were retained. These objections were countered by another consultor who remarked that the Church should present the demands of Christian life, including the principle of indissolubility of the marriage bond even though they might be perceived by some as countercultural. He added that processing marriage nullity cases in tribunals functioning within the parameters set up by *Causas matrimoniales* proved to be more effective than in tribunals operating on the basis of special concessions to expedite the process. He also emphasized the use of human and institutional resources in a more effective

<sup>51</sup> For a detailed presentation of the discussion of canon 347 of the Schema in the *coetus*, see A.M. LÓPEZ MEDINA, “La confirmación obligatoria de sentencias declarativas de nulidad matrimonial. Cuestiones debatidas en la Comisión para la reforma del Código de derecho canónico (1977–1981),” in *The Person and the Challenges*, vol. 5, no. 2 (2015), 187–190.

<sup>52</sup> COETUS STUDIORUM DE PROCESSIBUS, Acta Commissionis, session 6, 30 March 1979, in *Communicationes*, 11 (1979), 265.

<sup>53</sup> See *ibid.*, 265–266.

<sup>54</sup> López Medina remarks that the sentiments of the consultor were shared by canonists from places other than the USA, as the idea of obligatory appeal of every sentence would seem strange to them. See LÓPEZ MEDINA, “La confirmación obligatoria de sentencias declarativas de nulidad matrimonial,” 189.

way, including the creation of regional second instance tribunals which would alleviate the problem.<sup>55</sup>

Ultimately, in the vote on the obligatory review of affirmative marriage nullity sentences, the result was a decisive *placet 8, non placet 1*. The objections voiced by the lone consultor were rather of pragmatic order, while the *coetus* seemed to follow, on the one hand, a value-oriented approach of safeguarding the veracity of the judgments and therefore promoting the institution of marriage at a time when it was being attacked by contemporary culture and, on the other hand, the factual data gathered through an evaluation of the way the ecclesiastical tribunals functioned. Eventually, a new draft of canon 347 was proposed and unanimously approved.

§1. The sentence which first declared the nullity of the marriage together with the appeals if there are any and the other acts of the trial, are to be sent ex officio to the appellate tribunal within twenty days from the publication of the sentence.

§2. If the sentence rendered in favor of the nullity of marriage was in the first grade of trial, the appellate tribunal by its own decree is to confirm the decision without delay or admit the case to an ordinary examination of a new grade of trial, after considering the observations of the defender of the bond and those of the parties if there are any.<sup>56</sup>

The next phase of the revision was sending the text of the *1980 Schema* to the Code Commission in July 1980. It is interesting to see that the objections to canon 1634 (corresponding to the amended text of canon 347) came from the members representing Anglo-Saxon countries.<sup>57</sup> Cardinals George

<sup>55</sup> López Medina, writing some 35 years later, considers the prognosis of the consultor to be overly optimistic as, over the years, the problem had not found any easy solution. See *ibid.*

<sup>56</sup> “§ 1. Sententia, quae matrimonii nullitatem primum declaraverit, una cum appellationibus, si quae sint et ceteris iudicii actis, intra viginti dies a sententiae publicatione ad tribunal appellationis ex officio transmittatur. § 2. Si sententia pro matrimonii nullitate prolata sit in primo iudicii gradu, tribunal appellationis, perpensis animadversionibus defensoris vinculi et, si quae sint, etiam partium, suo decreto vel decisionem continenter confirmet vel ad ordinarium examen novi gradus causam admittit” (*COETUS STUDIORUM DE PROCESSIBUS, Acta Commissionis*, 267).

<sup>57</sup> López Medina makes this observation, without, however, offering any explanation. See LÓPEZ MEDINA, “La confirmación obligatoria de sentencias declarativas de nulidad matrimonial,” 191. The explanation may very well be the following: from the experience of this writer it is clear that the Anglo-Saxon world of canonists is tightknit, with the shared language of publications and conversations, the two centers of canon law studies, Catholic University of America in Washington, DC, and Saint Paul University in Ottawa, attendance at canonical conventions of the canon law societies, and highly respected academics and practitioners offering their advice worldwide (the late Frank Morrissey being the best exemplification of that phenomenon). The effectiveness of the tribunal system in the USA was greatly enhanced by

Basil Hume, OSB, Archbishop of Westminster; Tomás Séamus Ó Fiaich, Archbishop of Armagh; and James Darcy Freeman, Archbishop of Sydney, were highly critical of the new draft of the canon. The *Relatio* refers to an evaluation of the draft of canon 1634 offered by Cardinal Hume:<sup>58</sup> “[...] a new procedure is now proposed – whereby the very Court of first Instance is in effect obliged to appeal against its own decision – which is a juridical absurdity and contradicts all sound reason.”<sup>59</sup> He complained that the recommendation of the Episcopal Conference of England and Wales submitted in the process of consultation of the schema *De processibus* in 1977 was not only not included in the *1980 Schema Codicis*, but “[...] the report of the discussion of the matter at the Pontifical Commission carries no evidence that the proposal [...] was ever considered.”<sup>60</sup> The *Relatio* summarized the proposal of Cardinal Hume and Cardinal Ó Fiaich: the norm demanding an appeal should at least be modified in such a way that if the case was decided in first instance by a college of three judges, then the appeal should be left *pro conscientia defensoris vinculi* and the appeal of the defender of the bond be mandatory only if the case was decided by a sole judge, with the stipulation that the defender of the bond of second instance could renounce this appeal.<sup>61</sup> Cardinal Hume’s proposal of a new draft of canon 1634 is duly replicated in the *Relatio*.<sup>62</sup>

application of American Procedural Norms and other conferences of bishops requested from the Holy See similar solutions for their territories. The same canonists who voiced the idea of suppressing the obligatory appeal were experts of their conferences of bishops. The new solutions were debated and approved in the respective canon law societies before formulating them as animadversions offered by the conferences of bishops to the Holy See during the consultation stage. And indeed, even shortly before the promulgation of the *Mitis Iudex*, the idea of suppressing the obligatory review was voiced in private talks.

<sup>58</sup> PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens synthesim animadversionum ab Em. mis atque Exc. mis Patribus Commissionis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis*, Typis polyglottis Vaticanis, 1981 (= PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens*), 329.

<sup>59</sup> The text of the Animadversio of Card. Hume, of 16 December 1980, is provided in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Acta et documenta Pontificiae Commissionis Codici iuris canonici recognoscendo, Congregatio plenaria, diebus 20–29 octobris 1981 habita*, Typis polyglottis Vaticanis, 1991 (= PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio plenaria*), 100–101, here at 100.

<sup>60</sup> Animadversio of Card. Hume, in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio plenaria*, 100. See also Observation of Cardinal Ó Fiaich, 7 January 1981, in *ibid.*, 105.

<sup>61</sup> See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens*, 329.

<sup>62</sup> See *ibid.*, 329–330.

The objections of Cardinal Gerald Emmett Carter, Archbishop of Toronto were also presented,<sup>63</sup> among others, his warning that canon 1634 is the most controversial norm in the proposed new Code and the very acceptance of the Code might be compromised in some local Churches. He stated that the reasons for eliminating the obligation of mandatory appeal<sup>64</sup> “[...] are evident and need not be repeated,”<sup>65</sup> but if the Holy See would not consider removing the mandatory appeal, then appropriate exceptions should be provided for particular local Churches.<sup>66</sup> In other words, “[b]ecause of a few possible abuses that are considered to have occurred here and there, the entire Church should not have to suffer.”<sup>67</sup>

The position of the Archbishop of Cincinnati, Joseph Louis Bernardin, Chairman of the Canonical Affairs Commission and former president of the National Conference of Catholic Bishops (NCCB) is also presented in the *Relatio*.<sup>68</sup> In his statement of 10 June 1981, he remarked that

“[t]he bishops of the United States, with experience of eleven years, are convinced that the mandatory review of the sentence and acts is not essential to the integrity of the tribunal process. [...] the defender of the bond and the judges of the first instance are sufficient guarantees that moral certitude can be reached and justice served. [...] means other than the restitution of the *obligation* to appeal every affirmative sentence can be employed to correct abuses where they exist.”<sup>69</sup>

He also pointed to the uniqueness of the situation of the United States which, in his view, required a mitigation of the obligation of the mandatory review specifically for his country.<sup>70</sup>

The *coetus* of consultors decided unanimously that the animadversions should not be admitted and they firmly rejected the alleged irrationality and juridic absurdity of the proposed norm. They also stressed the lack of canonical precision in treating the new institution of review of sentences as an

<sup>63</sup> See *ibid.*, 330.

<sup>64</sup> Some interventions continue to refer to the obligation of “mandatory appeal,” while in fact the newly introduced draft of canon 1634 concerned the obligatory review of each sentence which first declared the nullity of a marriage.

<sup>65</sup> Animadversio of Card. Carter, in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio plenaria*, 102.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens*, 330.

<sup>69</sup> Statement of Archbishop Joseph Bernardin, in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio plenaria*, 103.

<sup>70</sup> See *ibid.*, 104.

“appeal.” Finally, due to the importance of the issue, they decided to refer it to the plenary session of the Code Commission.<sup>71</sup>

The views of the opposition to canon 1634 were presented for discussion in the *Plenaria*. In his votum for the plenary session of the Pontifical Commission for the Revision of the Code of Canon Law, Archbishop Aurelio Sabattani, Secretary of the Supreme Tribunal of the Apostolic Signatura, stated<sup>72</sup> that the proposed procedure for marriage nullity trials seems simpler than ever before in recent centuries. He considered the review of all judgments first declaring the nullity of a marriage by a different judicial *coetus* as “[...] an outstanding and very efficient means to avoid erroneous and excessively subjective judgments [...].”<sup>73</sup> He also pointed to the statistical data on the operation of the system of ecclesiastical tribunals in the United States, which revealed some shortcomings: judges with no academic degree in canon law, an exceedingly high number of declarations of nullity, inexplicable celerity in rendering decisions, turning Norm 23, §2 of the American Procedural Norms into a mere formality through routinely granting dispensations from the obligation to appeal, instances of obtaining declarations of nullity through fraud or denial of the right of defense to the respondent.<sup>74</sup> He concluded that if the review of judgments first declaring the nullity of a marriage will serve to uphold the sacred character of the marriage bond while leaving the appeal to the conscience of the defender of the bond, would prove ineffective in view of the experience drawn from the operation of ecclesiastical tribunals in the United States.

In his votum, Ignatius Gordon, professor of the Gregorian University also highlighted the statistics of the activity of ecclesiastical tribunals in the United States as indicative of serious problems. He argued that the parties in marriage nullity processes often share the same goal of having their marriage declared null and this does not contribute to the discovery of objective truth and serving justice.<sup>75</sup> He also indicated that the role of the defender of the bond is different from the role of the judge, and his ability to appeal might be compromised for reasons other than purely objective ones. Therefore, he

<sup>71</sup> See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens*, 331.

<sup>72</sup> López Medina considers the votum as a direct response to the statement of Archbishop Bernardin. See LÓPEZ MEDINA, “La confirmación obligatoria de sentencias declarativas de nulidad matrimonial,” 196.

<sup>73</sup> “[...] medium est eminens et magis efficax ad praecavenda pericula iudicii falsi et nimis subiectivi [...]” (Votum of Archbishop Aurelio Sabattani, 10 August 1981, in PONTIFICIUM CONSILIIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio plenaria*, no. 3, 107).

<sup>74</sup> See *ibid.*, no. 4, 108–110.

<sup>75</sup> See Votum of Ignatius Gordon, 10 August 1981, in PONTIFICIUM CONSILIIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio plenaria*, no. 30.1, 116.

concluded that the obligatory review of judgments or the obligatory appeal by the defender of the bond are required if the principle of indissolubility of marriage were to receive serious support through the tribunal processes.<sup>76</sup>

No wonder that those critical expert opinions of Archbishop Sabattani and Professor Gordon met with a rebuttal prepared by experts representing the opposite side of the controversy. The Canon Law Committee of the U.S. Episcopal Conference commissioned written animadversions to address directly the objections raised by Sabattani and Gordon.<sup>77</sup> The response is detailed and argues most of the points raised by the Roman experts. While a systematic analysis of this document is not the object of this reflection,<sup>78</sup> one can look at the argumentation employed to counter the views of the opponents.

The evaluation of the tribunal activities in the United States by Archbishop Sabattani was strongly contested. The rebuttal addressed the question of proliferation of affirmative sentences and remarked that even if a judge lacks an academic degree in canon law, it does not follow logically that his judgments are erroneous.<sup>79</sup> Therefore, the animadversions proposed that the problem be dealt with by reviewing the activity of particular tribunals, and not the review of all affirmative judgments.<sup>80</sup>

There is also another interesting aspect of the defense mounted by the American canonists. Regarding the objection that the exception of granting dispensations from the obligation to appeal was effectively turned in to a rule (it has been done in 96% of cases),<sup>81</sup> they pointed to their conviction that “[...] tribunals have been investigating and deciding concerning only the most obvious matrimonial nullities. The result is that their affirmative decisions are in fact very clear and an obligatory appeal is openly superfluous [...].”<sup>82</sup> Perhaps

<sup>76</sup> See *ibid.*, nos. 31.2–32, 34, 117.

<sup>77</sup> See Written Animadversions, Commissioned by the Canonical Affairs Committee of the U.S. Episcopal Conference, concerning the Vota of His Excellency, the Archbishop Secretary of the Signatura Apostolica, and the Reverend Father Ignatius Gordon, S.I., Professor at the Pontifical Gregorian University (= Written Animadversions), in *PONTIFICIUM CONSILIIUM DE LEGUM TEXTIBUS INTERPRETANDIS*, *Congregatio plenaria*, 235–253, with the Latin summary, 253–257.

<sup>78</sup> For a comprehensive presentation of the discussion, see LÓPEZ MEDINA, “La confirmación obligatoria de sentencias declarativas de nulidad matrimonial,” 195–219.

<sup>79</sup> *Ibid.*, 237.

<sup>80</sup> *Ibid.*, 238.

<sup>81</sup> *Votum* of Archbishop Aurelio Sabattani, no. 4d, 109.

<sup>82</sup> Written animadversions, 242. The argumentation pattern to counter Sabattani’s objections is rather peculiar. It reads: “Archbishop Sabattani argues that the Episcopal Conference of the USA has abused the faculty to grant a dispensation by turning an exception into the rule. In the objective order this criticism is valid since the Conference has brought to juridical finality the vast majority of declarations of nullity by dispensing the defender of the bond

using this argument was a two-edged sword, as one could argue that when the “most obvious” cases no longer constitute such a majority, the obligatory review would be justified.<sup>83</sup>

There is, however, an additional issue to ponder. At the beginning of the *Animadversions*, the American side remarked that Sabattani seemed to base his stance on the mandatory review “[...] not on practical concerns but upon concerns of *principle* [emphasis in original]. It suggests a fundamental unwillingness to trust the performance of the personnel of first instance tribunals, in particular the judges and the defender of the bond.”<sup>84</sup> The authors of the *Animadversions* pointed to what they considered Sabattani’s determination of the purposes of the mandatory review “[...] the prevention of error and subjectivism,”<sup>85</sup> and the protection of the stability of marriage and family which is “[...] only a mediate end, not an immediate end, since it derives from the absence of error and false judgment.”<sup>86</sup> But if this was so, then the *Animadversions* should have addressed primarily the question of the principle that is the prevention of error and subjectivism in judicial pronouncements.

from the obligation to appeal at the request of the defender of the bond’s Ordinary and the consent of the defender himself. Such a situation is startling when one considers that a dispensation is the relaxation of the law in a particular case. Archbishop Sabattani presumes that such a development represents an abuse. The defenders of the bond who consent to such dispensations do not consider these dispensations an abuse. Nor do their Ordinaries who voluntarily petition for such dispensations. Nor does the administration of the Episcopal Conference consider their actions an abuse. Why not? Because they are all aware of the statistical situation described above and the fact that tribunals have been investigating and deciding concerning only the most obvious matrimonial nullities. The result is that their affirmative decisions are in fact very clear and an obligatory appeal is openly superfluous (*aperte superflua*)” (ibid.). See also ibid., 239–240 for a presentation of the strategy of accepting only “the most obvious” cases in the ecclesiastical tribunals in the USA.

<sup>83</sup> Archbishop Sabattani stressed that the concession in art. 23 § 2 of APN was to be used in exceptional cases (*pro casibus exceptionalibus valere*) and invoked in his votum the reminders issued by the Council for the Public Affairs of the Church asking for “[...] exercising great caution in its application (*magna adhibeatur cautio in eius applicatione*)” (J. [card.] VILLOT, *Epistola Consilii pro Publicis Ecclesiae Negotiis ad Praesidem Conf. Episcopalis U.S.A. circa cessationem normarum*, 20 June 1973, in GORDON and GROCHOLEWSKI [eds.], *Documenta recentiora circa rem matrimoniale et processuale*, no. 1436, 254), and “[...] to resort to a dispensation from the provision on the appeal of the defender of the bond not until a truly grave necessity demands it (*ad dispensationem a praescripta defensoris vinculi appellatione, nonnisi ubi gravis vere necessitas postulet recurratur*)” (J. [card.] VILLOT, *Epistola Consilii pro Publicis Ecclesiae Negotiis ad Praesidem Conf. Episcopalis U.S.A., qua vigor Normarum prorogatur*, 22 May 1974, in ibid., no. 1440, 255). See *Votum of Archbishop Aurelio Sabattani*, no. 4d, 109.

<sup>84</sup> Written *Animadversions*, 236.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.



However, the argumentation goes one-sidedly into the direction of rebutting the analysis of the statistical data on American tribunals, without addressing the means of safeguarding the correctness of the process of arriving at the truth in judicial decisions.

Indeed, it does not seem that the obligatory review in itself is an expression of “[...] a fundamental unwillingness to trust the performance of the personnel of first instance tribunals [...].”<sup>87</sup> It corresponds rather to a common-sense observation that errors in judgments are possible, and the mandatory review helps eliminate the danger of pastoral practice relying upon some objectively erroneous judgments, thus not corresponding to the truth of the matter (the existence of the marriage bond). Here the American *Animadversiones* seem to hold that the question was “[...] whether the mandatory review will prevent error and false judgments while its replacement with some sort of optional review will result in the opposite, an increase in erroneous and false judgments.”<sup>88</sup> From the logical point of view, there is no correlation between the correctness<sup>89</sup> of a particular judgment (decision on the matter at stake) and the mandatory review as a procedural institute. There is, however, a likely impact on the final outcome—detection of erroneous judgments<sup>90</sup> by the judges of second instance and prevention from making pastoral decisions not based in material truth. It seems that the wording of Sabattani’s *votum* was more nuanced than it was deemed by his critics. Nevertheless, also the Roman party to the discussion did not explain why the review of sentences first declaring the nullity of a marriage is an efficient means to avoid erroneous judgments. For such a justification, the properly epistemological issues need to be articulated.<sup>91</sup>

<sup>87</sup> It was rather predictable that this type of allegation of inferior motives in proposing the obligatory review would not sit well with the experts representing the Roman side of the controversy.

<sup>88</sup> Written *Animadversiones*, 236–237.

<sup>89</sup> The notion of correctness is used here to denote the property of respecting what has to be followed in order to conform to the requirements of a given process; the legitimacy of the argument would have factual, legal and logical components.

<sup>90</sup> In a particular case, an affirmative judgment can be a false statement about the reality (declaring the non-existence of the marriage bond while the opposite is true). A judgment declaring *non constat nullitate* means that the judge has not reached moral certitude that the marriage is invalid. This judgment may be erroneous in the sense that the judge should have reached moral certitude on the basis of the available evidence, but as such, it cannot be false as it is not a direct statement about the existence of the bond. For that reason, the present article does not use the term “false” judgment but rather “erroneous” judgment.

<sup>91</sup> On a more personal note: it appears to me that while ontological and anthropological concepts enter into the core of canonical doctrine, especially in marriage law, the epistemological enquiries seem to be hardly noticeable in the present canonical discourse.

Critics of the two vota spent a lot of effort proposing ways of exercising vigilance over the tribunals rather than discussing the obligatory review of affirmative judgments.<sup>92</sup> However, the vigilance they proposed was aimed at the quality of the broadly understood tribunal activities while the aim of the obligatory review was to verify the outcome of a particular case. Although there is some possible correlation of those two aspects, nevertheless, strictly speaking, the object of the evaluation in the first case is the functioning of an ecclesiastical institution and its agents, when in the second case the review concerns the judicial decision which is a statement on the specific subject matter. There was a substantial difference between the two approaches on how to address the issue: the Americans viewed a remedy in some, pragmatically oriented, administrative instruments of vigilance over tribunals, while the Holy See experts preferred introducing corrective measures into the process itself, therefore emphasizing the epistemological factors.

As to the proposal that only judgments issued by a single judge be the subject of an obligatory review, Gordon opined that the distinction between a judgment rendered by a single judge and a judgment rendered by a college is insufficient to eliminate the obligatory review.<sup>93</sup> Similarly, he considered the proposal that the defender of the bond of second instance be allowed to renounce the appeal made obligatorily by the defender in first instance as amounting to nullification of this obligation, as the decision of the defender of the bond would not constitute a judicial review.<sup>94</sup> While the American party noticed the theoretical value of this argument, admitting that a judicial review would concern “the substance of the affirmative decision,”<sup>95</sup> nevertheless in their counterargument they did not refer to the question of the substance of the judicial action otherwise than by proposing that a sole judge in the appeal tribunal review the affirmative sentences.<sup>96</sup>

It seems that the *Signatura* officials had their own and firm view of American tribunals, with some tangible evidence to support their conviction. However, the American side offered a very different interpretation of the same data which, at times, seems to be an evasion of the actual question. The facts were rather difficult to dispute and the explanations were not convincing. It seems that the Americans were relying on the expectation of a faithful

<sup>92</sup> Written *Animadversions*, 249–251.

<sup>93</sup> See *Votum* of Ignatius Gordon, no. 50, 120. This statement was criticized as not supported by arguments other than a conviction that other solutions would not prevent abuses. See *Written Animadversions*, 251.

<sup>94</sup> See *Votum* of Ignatius Gordon, no. 51, 120.

<sup>95</sup> *Written animadversions*, 251–252.

<sup>96</sup> See *ibid.*, 251.

observance of the norms of canonical discipline while Rome based its arguments on the observation that the reality did not meet this ideal. The Roman experts were deeply convinced of serious flaws in American tribunal operations when their opponents were fiercely defending their privileged position as the APN were operative and indeed helped in many regards with the smooth operation of tribunals. Nevertheless, the hard statistical data gathered by Roman authorities<sup>97</sup> called for a plausible explanation; despite a serious effort on the American side, it does not seem that the explanation was plausible, and that not only to the Roman side of the controversy, but also to an independent observer. It looks as if there were two different worlds and those worlds never met.

During the plenary session of the Pontifical Commission for the Revision of the Code of Canon Law (20–29 October 1981), the question of the appeal in marriage nullity trials was debated first, in Session I, on 20 October 1981, and was formulated as:

- a) Whether in marriage nullity cases, it is always necessary to require a review of the judgment which has first declared the nullity of a marriage by the appeal tribunal, as established in 1634?
- b) or it is sufficient to leave it to the conscience of the defender of the bond,
- c) or at least demand it only if the sentence was rendered by a single judge?<sup>98</sup>

Archbishop Rosalio Castillo Lara, the Secretary of the Pontifical Commission for the Revision of the Code of Canon Law considered the question as pertaining more to “juridical and pastoral prudence”<sup>99</sup> than to juridical doctrine: the judgment which has first declared the nullity of a marriage does not have to be per se subject to appeal and the decision of Benedict XIV was dictated by the aim of better protecting the sanctity of marriage.<sup>100</sup>

Archbishop Bernardin presented the view of the National Conference of Catholic Bishops as expressed in the response to the vota of Sabbatani and Gordon, commissioned by the Canon Law Committee of the Conference. In his intervention, he offered some salient points. First of all, he invoked the firm adherence of the Conference to the doctrine of the indissolubility of marriage. Second, he stressed the need for an efficient marriage nullity process to be operative in the United States, with its high rate of divorce, to

<sup>97</sup> I did not encounter any evidence, though, that those statistical data were analyzed through the use of properly statistical methods.

<sup>98</sup> *Secunda questio specialis: de appellatione in causis nullitatis matrimonii*, in *PONTIFICIUM CONSILIIUM DE LEGUM TEXTIBUS INTERPRETANDIS, Congregatio plenaria*, 98.

<sup>99</sup> *Examen secundae questionis: de appellatione in causis nullitatis matrimonii*, in *ibid.*, 230.

<sup>100</sup> *Ibid.*

combat “secularistic mentality” which rejected the permanence of the marriage bond. While not denying instances of abuse of the APN regarding dispensations from the appeal, he insisted that the obligatory review would not remedy the situation but rather exacerbate it, by making the marriage nullity processes too cumbersome.<sup>101</sup>

The question was discussed during Session II, on 21 October 1981. Several members spoke in favour of retaining the obligation of canon 1634. Cardinal Julio Rosales y Ras, Archbishop of Cebu, Philippines, stressed the educational role of law, promoting conjugal fidelity and the good of the family. Consequently, the law of the Church cannot cave to the social pressure of multiplying nullity decisions but must promote the principle of indissolubility of marriage.<sup>102</sup> Cardinal Laurean Rugambwa, Archbishop of Dar-es-Salaam, Tanzania, considered abandoning the obligatory review as contrary to the principle that marriage enjoys the favor of law. He focused on the fact that many judgments first declaring nullity are overturned by appeal tribunals, as evident from an analysis of statistical data.<sup>103</sup> Cardinal Gabriel-Marie Garrone, former Prefect of the Congregation of Catholic Education opined that the proposed measures which in some parts of the Church are considered repressive are, in fact, preventive. He even suggested that some explicative phrases be added to the canons, stressing the gravity of the matter and the need for the correct perception of the Church’s teaching on the sanctity of Christian marriage.<sup>104</sup> Cardinal Pietro Palazzini, Prefect of the Congregation for the Causes of Saints, argued that the institution of obligatory appeal in marriage nullity cases differs from appeals in other types of legal controversies because it pertains directly to the principle of indissolubility of marriage and the salvation of the parties involved. He also pointed to statistics showing laxity in the proceedings of some tribunals and the dangers that defenders of the bond assume erroneous concepts of “autonomy of individual conscience” and its “emancipation from the law.”<sup>105</sup> As to the arguments based on the question of expenses related to the tribunal organization and functioning, he noticed that the permission to constitute sole judge tribunals was accorded predominantly, if not exclusively, to dioceses which did not lack material resources.<sup>106</sup> Cardinal Narciso Jubany Arnau, Archbishop of Barcelona, Spain, directed the attention of the Commission to the

<sup>101</sup> See *ibid.*, 232–233.

<sup>102</sup> See *ibid.*, 261–262.

<sup>103</sup> See *ibid.*, 262–263.

<sup>104</sup> *Ibid.*, 263.

<sup>105</sup> *Ibid.*, 264.

<sup>106</sup> See *ibid.*, 265.

widespread mentality of divorce and the undeniable fact of abuses in ecclesiastical tribunals. He indicated that in Spain there was a perceivable *fuga causarum*, a trend to present marriage nullity cases to tribunals in some countries in America and Africa in which declarations of marriage nullity were more easily granted.<sup>107</sup> Ultimately, he saw the objective truth as the fundamental question at stake in the discussion of canon 1634.<sup>108</sup>

On the other hand, Cardinal Hume, while generally upholding his previously expressed opinion, proposed its amended version.<sup>109</sup> In a similar vein, Cardinal Franz König, Archbishop of Vienna, favoured no obligatory appeal if the judgment was rendered by a college of judges.<sup>110</sup>

Speaking from his own experience as a consultor, Archbishop József Bánk, Bishop of Vác, Hungary, stressed the highest level of canonical expertise of the canon drafters and the length of the drafting process. He called for the approval of the proposed canon 1634 without any delay as the new Code was eagerly awaited by the Church.<sup>111</sup> Aloisius E. Henriquez Jimenez, Archbishop of Valencia in Venezuela, remarked that judgments which declare that the marriage is evidently null and consequently would not require another judicial review are rather rare.<sup>112</sup> The last member of the Commission to intervene was Cardinal Johannes Gerardus Maria Willebrands, Archbishop of Utrecht, Netherlands, who opted for leaving appeals solely to the defender of the bond and the parties.<sup>113</sup>

After an intervention of Cardinal Felici, the vote was taken; out of 59 members present, 46 (78%) voted for the obligatory review of all judgments which have first declared the nullity of a marriage by the appeal tribunal, as established in 1634 (*affirmative* to question a). In view of this result, no subsequent vote on other proposals (b and c) was needed. Canon 1634 of the 1980 *Schema* was, therefore, retained without any textual change as canon 1682 of the 1982 *Schema* and, subsequently, as canon 1682 in the 1983 Code of Canon Law.

It is rather not surprising that pastoral and practical reasons proposed by the Anglo-Saxon world were vulnerable to carefully arranged counterarguments, supported with hardly contestable statistical data, and in fact, had

<sup>107</sup> See *ibid.*, 268–269. “Haec sunt facta, et mihi videtur quod contra facta non sunt argumenta” (*ibid.*, 269).

<sup>108</sup> See *ibid.*, 269–270.

<sup>109</sup> See *Animadversiones scripto missae vel traditae*, Card. Hume, in *PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS*, *Congregatio plenaria*, 275–276.

<sup>110</sup> *Examen secundae questionis*, 270.

<sup>111</sup> See *ibid.*, 271.

<sup>112</sup> See *ibid.*, 272.

<sup>113</sup> See *ibid.*, 272–273.

been defeated. Here one might conclude that the last word belonged to the cardinals of the Roman Curia, later sanctioned by the decision of the supreme legislator.

### ***3 — Recent Discussion on the Suppression of Obligatory Review and the Decision of the Supreme Legislator***

The “training ground” provided by ecclesiastical tribunals in the United States using the APN was a unique experience, notwithstanding any further evaluation in theoretical terms. As such, it offered a first-hand encounter with the procedural solution which is now, though in a different form, enshrined in the law. On the occasion of the revision of the Code of Canon Law that singular experience was subjected to a scrutiny and found wanting. Nevertheless, as it was probably to be expected, the thorny issue of maintaining or abolishing the requirement of a double conforming sentence was discussed after the promulgation of the 1983 Code, in the process of drafting the instruction *Dignitas connubii*. The discussion accelerated in the context of the Synod on the Family (2014).<sup>114</sup>

The Synod participants were divided on the issue. Some advocated the need for retaining the discipline of the 1983 Code, while others supported the abolition of the demand of a double conforming sentence.<sup>115</sup> While proponents of maintaining the obligation were motivated by the aim of safeguarding the veracity of the judicial decisions, opponents accentuated the celerity of the marriage nullity process. It seems that the reasons for retaining the obligation were related to abuses on the part of some tribunals, both at first and second instance. On the other hand, the proponents of a new regulation relied on the quest for the effectiveness of the ecclesiastical system of marriage tribunals in responding to the needs of the faithful asking for declarations regarding the validity of their marriage bond. They pointed to the variety of situations. Some local Churches with enough tribunal personnel, competent and committed to their task, had a well-functioning system of tribunals.<sup>116</sup> Still others, in which the celerity of the process might have been exemplary, had tribunals in which cases were treated superficially, with a failure of the marriage equated with its

<sup>114</sup> See C. PEÑA GARCÍA, “L’appello nelle cause matrimoniali,” in H. FRANCESCHI and M.A. ORTIZ (eds.), *Ius et matrimonium II: Temi processuali e sostanziali alla luce del Motu Proprio Mitis Iudex Dominus Iesus*, Subsidia canonica, no. 21, Rome, EDUSC, 2017, 310.

<sup>115</sup> See J. LLOBELL, “Prospettive e possibili sviluppi della *Dignitas connubii*: Sull’abrogazione dell’obbligo della doppia sentenza conforme,” in *Periodica de re canonica*, 104 (2015), 247.

<sup>116</sup> Llobell points to such a success story in the case of Spain. See *ibid.*, 258–259.

nullity and the appeal tribunals ratifying sentences with “bureaucratic formality.”<sup>117</sup> It shows that not necessarily the number and competence of personnel would determine the proper functioning of the system, but the attitude of persons involved and something that could be termed “ecclesial culture.” Other elements of social and cultural environment also might play a role, like the philosophical presuppositions regarding the very possibility of attaining the truth of the statements about the reality, increasingly questioned in contemporary society. Training of a new personnel is, therefore, crucial, not only in number but in quality.<sup>118</sup>

Since statistical data played an important role in arguing for the retention of the obligatory review, it is imperative to consider the statistical facts gathered in the current context. Peña García referred to statistics<sup>119</sup> which demonstrate that the great majority of nullity declarations were confirmed by a decree of the appellate tribunal; the question therefore arose as to the feasibility of maintaining an obligation causing considerable delays in responding to the demands of the faithful and presupposing “a generalized suspicion towards the conduct of the diocesan ecclesiastical tribunals.”<sup>120</sup> However, the numerical data in themselves cannot conclusively prove that those sentences of first instance tribunals *should have been* confirmed; one could point to the above mentioned bureaucratic, purely formalistic approach of some appellate tribunals as one of the possible explanations. The statistical data, therefore, must be evaluated also in the context of the canonical quality of the appellate interventions.

[...] it appears to be a statistical fact that throughout the world, and most especially in the United States, the appellate tribunals, to which causes were transmitted ex officio by a tribunal first declaring the nullity of marriage, have confirmed the affirmative sentence in a great majority of cases—whether immediately or after carrying out an ordinary contentious process. This may give one the impression that the requirement of a double conformity of sentences, and the just-cited, now derogated procedural institute has been superfluous and thus not necessary for protecting the indissolubility of marriage.

This conclusion, however, fails to consider the example of the Tribunal of the Roman Rota, whose jurisprudence is of the highest value in the canonical

<sup>117</sup> Ibid., 259. Frans Daneels introduces a word of caution: “To conclude from this fact, as Professor Llobell does, that the obligatory second instance had become pure formalism in a great percentage of cases, seems to me an exaggeration” (F. DANEELS, “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” in *J*, 76 [2016], 127).

<sup>118</sup> LLOBELL, “Prospettive e possibili sviluppi della *Dignitas connubii*,” 262–263.

<sup>119</sup> She refers to the *Annuario statisticum Ecclesiae 2012*.

<sup>120</sup> PEÑA GARCÍA, “L’appello nelle cause matrimoniali,” 312.

system of matrimonial nullity, including its jurisprudence in the area of the confirmability of an affirmative sentence.<sup>121</sup>

Daniel points to the statistics from the Roman Rota from 2000–2012, which show that “[...] in almost 75% of the causes presented to the Roman Rota, it does not confirm affirmative sentences. In other words—to state it somewhat provocatively – about 75% of the affirmative sentences transmitted to the Rota for possible immediate confirmation unjustly declared the nullity of marriage [...].”<sup>122</sup> Therefore, he concludes that

[...] the requirement of a double conformity of sentences was not a superfluous institute falling somehow outside of the rationality of the canonical order. Rather, it was one that was poorly implemented and which the Apostolic See had not yet been able to address effectively, given the little heed that seemed to be paid to the guidance of the Apostolic Signatura in its function of providing for the correct administration of justice and to the consistent and thoroughly sound example of the Roman Rota.<sup>123</sup>

Without calling into doubt the solidity of the jurisprudence of the Roman Rota, one must recognize however, the tacit assumption that the determinations of the Roman Rota were always correct. In principle, this could be proven or disproven (or at least strengthened or weakened as a claim) through an analysis of the particular Rotal decisions.

Other sources, this time from the Apostolic Signatura, also confirm that “[...] the obligation of a double conforming affirmative sentence often contributed to avoiding a considerable number of mistakes in the remaining percentage of cases. Experience indeed shows that in several places serious appellate tribunals often overturned rather weak first instance decisions that had been given in favour of the nullity of a marriage.”<sup>124</sup> Nevertheless, some canonists concluded that it would be beneficial to suppress the obligation of a double conforming sentence, while at the same time promoting the role of the defender of the bond in appealing cases.<sup>125</sup> Although some admit that the obligatory review implies a better protection of the principle of indissolubility of marriage and the *salus animarum*, they determine that “[...] in the current circumstances, frequently its maintenance does not contribute to such

<sup>121</sup> DANIEL, “An Analysis of Pope Francis’ 2015 Reform of the General Legislation Governing Causes of Nullity of Marriage,” 451.

<sup>122</sup> Ibid., 452–453.

<sup>123</sup> Ibid., 453.

<sup>124</sup> DANEELS, “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” 128.

<sup>125</sup> LLOBELL, “Prospettive e possibili sviluppi della *Dignitas connubii*,” 267. Llobell mentions Prof. Paolo Moneta as a supporter of derogation from the requirement of a double conforming sentence. See *ibid.*, 270.



protection but instead leads to the alienation of numerous diocesan bishops and spouses from a judicial verification of the validity or nullity of failed marriages, because the same reasons indicated for rescinding the obligation of the double conforming sentence make its preservation a very onerous formality that can become incomprehensible [...].”<sup>126</sup>

Therefore, it seems that the celerity of the process took over the aim of providing better instruments for safeguarding the truth of the matter. Daneels grants that Pope Francis

[...] clearly prefers an appropriately speedy judicial process that is possible everywhere, rather than maintaining a more perfect system that was, in many places, not possible. The fact that, in order to attain this goal, some guarantees for a just decision have fallen by the wayside has to be accepted as the consequence of this choice. The underlying idea seems to be this: better the risk of some wrong decisions than no (or few) decisions in certain regions.<sup>127</sup>

From the logical point of view, one cannot deny that a judgment in first instance can conform to the truth of the matter. In any case, this is what is expected as the outcome of a structured and rigorous procedure. On the other hand, with the suppression of the obligatory review, the threshold of the safeguard against erroneous sentences would be lowered. Of course, one can debate what kind of measures are pragmatically required, but one has to notice that the Church lived with the obligatory appeal for a long time. There would not be anything excessive and unrealistic in conserving this state of affairs. The prudential decision of the legislator, however, was to the opposite.

Indeed, one might get an impression that what had transpired in the discussion during the revision of the Code and after its promulgation regarding the obligatory second instance has now found its place in *Mitis Iudex*. The new canon 1679 states: “The sentence which first declared the nullity of the marriage, once the terms as determined by canons 1630–1633 have passed, becomes executed.”<sup>128</sup> This has led some commentators to claim that this legislative decision “[...] eliminates a safeguard of the indissolubility of marriage that had been established by Pope Benedict XIV in 1741 and confirmed by solemn acts of several of his successors [...]”.<sup>129</sup> This conclusion, however, is too far-reaching as what might be directly endangered is rather the veracity of the Church’s pronouncements on the question of the existence

<sup>126</sup> Ibid.

<sup>127</sup> DANEELS, “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” 125.

<sup>128</sup> Can. 1679. Sententia, quae matrimonii nullitatem primum declaravit, elapsis terminis a cc. 1630–1633 ordinatis, fit executiva.

<sup>129</sup> See PEÑA GARCÍA, “L’appello nelle cause matrimoniali,” 313.

of the marriage bond, in particular instances, and subsequent pastoral decisions based on determinations which may not correspond to the truth. The notion of indissolubility is not directly affected by the change in the canonical discipline; it remains as such intact. Still other authors praise the legislator's choice and refute allegations that the suppression of a double conformity of sentences makes concessions to the divorce mentality or lowers the level of the safeguards for marriage; they rather see in it a recognition of the sincerity and dedication of the tribunal personnel and reducing the requirements placed on the faithful to the truly necessary ones.<sup>130</sup>

Promulgation of *Mitis Iudex* had a clearly pastoral aim – to respond to those who requested the decision within a shorter timeframe. From the point of view of the internal ordering of the marriage nullity process, the change does not have any direct bearing on the exactness of the result of the procedure. However, as it was seen during a lengthy, comprehensive, and at times, passionate discussion among canonists, human experience calls for some caution. For in the course of the marriage nullity procedure, the mental operations of the judge are not always simple as to their content and logical form. Numerous factors may adversely affect the correctness of the result: “[...] the requirement of the double conforming sentence had the goal of avoiding errors<sup>131</sup> in a matter of such great importance. Honest judges know that, even in good faith, an error is possible, and they are encouraged when their judgments are confirmed in second instance.”<sup>132</sup>

<sup>130</sup> PEÑA GARCÍA, “L'appello nelle cause matrimoniali,” 313.

<sup>131</sup> Some precision is necessary here as the statement may be confusing because it seems to use an equivocation – taking the term “error” in two different meanings: in the first part it refers to “error” on the level of the Church's pastoral action, i.e., having a valid marriage considered invalid and, consequently, letting the parties to enter into a subsequent (invalid) union, and, in the second part, an error committed by a judge in the process of rendering his decision; the requirement of the double conforming sentence has no direct bearing on the latter.

<sup>132</sup> DANEELS, “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” 127. Daneels refers to other canonists who share his point of view: Gordon Read, in his contribution “Pope Francis Simplifies and Speeds Up the Process for Declaring Marriages Null,” in *Canon Law Society of Great Britain and Ireland Newsletter*, 183 (September 2015), 8–10, “although welcoming the ‘removal from the process of the mandatory appeal’ (sic), observes nevertheless: ‘The downside is that there will be a lack of “quality control” except in the small number of cases appealed by one of the parties’” (cited by Daneels in “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” 127, footnote 17) or Roch Pagé, in his “Reflections of a Judicial Vicar of an Appeal Tribunal on the Proposed Reform of the Canonical Matrimonial Process,” in *J*, 75 (2015), 59–69, who “[...] was not in favor of the abolition of the mandatory double conforming sentence (cf. 64–65)” (DANEELS, “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” 127, note 17).

The deliberation about the obligatory review of all judgments declaring the nullity of a marriage was generally based on arguments founded on legal doctrine and juridical pragmatism. The question of whether the obligatory review is necessary in judicial procedures was not conclusively settled, and moreover, it seems that the dilemma can ultimately have its final solution only through the decision of the legislator. One could conclude that the objections voiced by the proponents of the obligatory review were either not taken into account or not deemed valid. If the latter, did the situation change to the extent that no worries were to be had,<sup>133</sup> or were the objections of the opposite side considered unfounded as a misinterpretation of the facts?

Admittedly, interpretation of the statistical data is not a simple task. However, one should take to heart the opinion of Frans Daneels, based on “[...] almost thirty years of experience in monitoring the status and activity of the tribunals throughout the entire Catholic Church,”<sup>134</sup> as secretary of the Supreme Tribunal of the Apostolic Signatura.

The quality of the administration of justice is [...] very different from region to region, and sometimes even from tribunal to tribunal. There remain a number of tribunals of low quality, which, due to poor understanding and a lack of improvement in their praxis, continue with a rather superficial jurisprudence. Such tribunals seem to consider the process for the declaration of nullity of a marriage an easy way to give a new chance to those in broken marriages, as if the mere fact of a broken marriage were evidence of its invalidity.<sup>135</sup>

Although Daneels introduced even more precision into his claims and maintained that the handling of cases in second instance tribunals in some Anglo-Saxon countries was “[...] even up to this day, often merely formalistic and very superficial,”<sup>136</sup> nevertheless, in opposition to this far-reaching generalization, he himself stressed that “[...] in a number of tribunals this was indeed pure formalism, but there has also been some significant improvement in recent years as the result of the patient work of the Apostolic Signatura.”<sup>137</sup>

The truth of the matter or reaching moral certitude about the nullity of a marriage has no direct connection to the organizational structure of ecclesiastical tribunals or the requirement of a double conforming sentence. It is the

<sup>133</sup> As indicated above, Daniel and Daneels seem to provide arguments that the situation did not change.

<sup>134</sup> DANEELS, “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” 116.

<sup>135</sup> *Ibid.*, 117.

<sup>136</sup> *Ibid.*, 126.

<sup>137</sup> *Ibid.*, 127–128.

consequence of the truth assessment process performed by the judge. With no obligatory review there is a certain risk of erroneous sentences, whether issued in good faith or as a result of sloppy attitudes of judges,<sup>138</sup> informing the pastoral action. The controlling role of the tribunals of the Holy See will not have any direct impact on the already decided cases when parties have already entered a new marital union, although they might proscribe some improper practices for the future. Much will depend on the will of the ecclesiastical authorities to exercise vigilance and on the enforcement of the law.

On the other hand, the institution of the obligatory review was a guarantee that each sentence first declaring the nullity of a marriage was subject to a check. Of course, this aim could have been frustrated by the formalistic attitudes of the appeal tribunal, something that Pope Benedict XVI warned against: “[...] the institution of a trial in general is not in itself a means of satisfying any kind of interest but rather a qualified instrument to comply with the duty of justice to give each person what he or she deserves. [T]he purpose of the proceedings is the declaration of the truth by an impartial third party [...].”<sup>139</sup> These fears are not without a basis in fact.

A more real danger is that, in the absence of the oversight of first instance tribunal decisions that the mandatory second instance process insured, first instanced tribunal decisions will gradually grow rather sloppy. That this concern is not imaginary can be gleaned from the experience in the United States from 1970 to 1983 when the provision of the American Procedural Norms for dispensation from mandatory appeal virtually eliminated appeals of affirmative decisions, except those by dissatisfied respondents. In the absence of any real oversight, decision writing in some tribunals became extremely sloppy with narratives of the story of the marriage largely replacing reasoned argument.<sup>140</sup>

Obviously, the role of the defenders of the bond has increased in importance. Indeed, since in the context of marriage nullity trials both parties might be vitally interested in having their marriage declared null, the onus falls on the defender of the bond:<sup>141</sup> “With the elimination of a mandatory second instance review of affirmative decisions, much of the responsibility

<sup>138</sup> “The fact that their judgment had to go before a further instance was also an inducement for them to fulfill their task and to write up the sentences with care” (ibid., 127).

<sup>139</sup> BENEDICT XVI, allocation to the Roman Rota, 28 January 2006, in AAS, 98 (2006), 136, in WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939–2002*, 290.

<sup>140</sup> J.P. BEAL, “*Mitis Iudex* Canons 1671–1682, 1688–1691: A Commentary,” in *J*, 75 (2015), 506.

<sup>141</sup> I abstain from judging the probability of defenders of the bond being reluctant, for all human reasons, to appeal their cases. I leave it to others who might have a better knowledge of tribunal inner workings.

for providing ‘quality control’ in the process has devolved to the defender of the bond. Without the involvement of the defender, not just in the phase of discussion of the case but throughout the trial, the integrity of the process can be easily jeopardized.”<sup>142</sup>

Based on his experiences at the Apostolic Signatura, Frans Daneels adds that, while the reformed procedure offers measures to protect the truth of the matter, nevertheless there is always the human factor to be taken into account.

Indeed, much will depend on the seriousness and professionalism of the first instance judges and especially on whether or not the defenders of the bond will take up their responsibility to appeal against unconvincing sentences. I regret to say that experience teaches that flawed jurisprudence in a tribunal often goes hand in-hand with a shoddy defense of the bond. Only time will tell if, and to what degree, the advantages of the suppression of the double conforming affirmative sentence might compensate for doing away with a guarantee that sought to foster sound jurisprudence even when this guarantee was not taken seriously in many appellate tribunals.<sup>143</sup>

However, the role of the defender of the bond is different than that of the judges. He is not doubling on the judge’s role in solving the issue itself, but raising objections and difficulties. One cannot exclude, therefore, that some weak judgments might be retained.

The juridical arguments have been presented, but one may wonder about an assessment of the new solution from a philosophical point of view. Philosophical, and especially epistemological reflection seems to be rare these days in canonical debates which tend to be precise, but often enough limited to the purely canonical perspective. In other words, if the purpose of the nullity trial is the discovery of the truth, does the obligatory review serve any epistemically useful purpose?

#### ***4 — Epistemological Consequences of the Suppression of the Mandatory Review***

Delving into the problematics of generally understood epistemology to find an acceptable solution required a determination of the proper field of reflection. It seems to this author that the inquiry can be situated in what is

<sup>142</sup> J.P. BEAL, “The Ordinary Process according to *Mitis Iudex*: Challenges to Our ‘Comfort Zone’,” in *J*, 76 (2016), 183.

<sup>143</sup> DANEELS, “A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage,” 128–129.

known in epistemology as the so-called “double-checking,” which can be understood as getting “[...] additional evidence bearing on the truth-value of a given proposition.”<sup>144</sup> Although this unquestionably constitutes a limitation, nevertheless, for practical reasons, from the rich volume of literature some of the most recent contributions in the Anglo-Saxon world were chosen.

Instead of providing an independent reflection on logical foundations of double-checking as an epistemic device, it is useful to turn to what epistemology offers in this regard. While this presentation does not attempt to lay the complete philosophical foundations of double-checking, nevertheless it can offer some useful insights contributing to a better understanding of an epistemic device which seems to be a common-sense strategy in various areas of life, both theoretical and practical. Moreover, epistemology seems to be developing these concepts at the present time and some of them are deemed controversial. The author has not found any complete epistemological theory that would directly address the issue at stake; moreover, he encountered a claim that “[...] one sort of practical matter [...] has not received proper attention in the literature: the epistemic significance of double-checking.”<sup>145</sup>

Curiously enough, it seems that the question of double-checking in epistemology is often related to the phenomenon of “incessant checking” which could be a sign of obsessive-compulsive behaviour, something familiar to the tribunal practice. Of course, the epistemological reflection goes beyond this limitation to consider the double-checking strategy on the philosophical rather than psychological grounds.

Elise Woodard offers a sensible starting point: “Responsible epistemic agents often engage in further inquiry. They double-check their calculations and reassess their evidence, sometimes seeking out more. This practice seems not only familiar but well-grounded. We know that we are fallible and liable to error, so double-checking, reconsidering, and gathering more evidence seem like salutary epistemic practices.”<sup>146</sup> As a professor, I witness regularly that, after having answered all questions on a written exam (especially those among them which require an original reflection expressed in a

<sup>144</sup> S.C. GOLDBERG, “Stakes, Practical Adequacy, and the Epistemic Significance of Double-Checking,” in T. SZABÓ and J. GENDLER (eds.), *Hawthorne Oxford Studies in Epistemology, Volume 6*, Oxford, Oxford University Press, 2019, 272.

<sup>145</sup> GOLDBERG, “Stakes, Practical Adequacy, and the Epistemic Significance of Double-Checking,” 267.

<sup>146</sup> E. WOODARD, “Why Double-Check?” <https://elisewoodard.org/s/Woodard-Why-Double-Check-Nov-16.pdf> (16 November 2020).

more complex written answer), students proceed to double-check the correctness of their answers. This was also visible in occasional reversal of their initial responses—parts of the text were stricken out and new elements added. It seems, however, that radical reversals were rather infrequent and a new response was not always correct. If one ventured into inquiring about the reasons for double-checking, most likely the answer would ultimately be that something important for a student was at stake—passing successfully the exam and avoiding perturbations of having a supplemental exam or even repeating the course.

There is, however, an objection voiced on the grounds of epistemology that double-checking necessarily includes a suspension of judgment regarding the truth of what is the subject of this operation.<sup>147</sup> If that were true then the whole concept of double checking could not fit easily into the context of the judge pronouncing on a case on the basis of moral certainty, which excludes any reasonable doubt to the contrary. Nevertheless, this claim is disputed by others who point to epistemic benefits of double-checking operations which do not presuppose such a doubt: “[...] epistemic agents can double-check with the aim of seeking further epistemic goods beyond knowledge. For example, they can double-check in order to attain certainty, higher-order knowledge, or increased sensitivity to error.”<sup>148</sup> In this understanding, the concept of double checking is applicable to the task of a judge.

Some opponents to double-checking notice a danger that “[a] checker’s epistemic position can remain largely stable in the long-run [...] although more and more checks are being performed, nothing at all is happening to the checker’s epistemic standing with respect to their answer.”<sup>149</sup> This would be true when the same person is doing the check of some facts accessible through the senses. One could claim that this scenario would be less likely when the check concerns a more complex epistemic process like argumentation. Even though no new data may be introduced, nevertheless the process can take a different route, although leading towards the same conclusion. There are still some gains possible, namely in strengthening the person’s belief (conviction) about a certain state of affairs. For even in solving mathematical problems, the route to the correct solution does not necessarily follow the same pattern, which would depend on the choices made by the

<sup>147</sup> “[...] genuinely inquiring into Q entails suspending judgment about Q” (J. FRIEDMAN, “Why Suspend Judging?” in *Noûs*, 51 [2017], 302–326). Friedman seems to modify her opinion and admits that “[...] double-checking is often perfectly acceptable epistemic practice, even for a knower” (FRIEDMAN, “Checking Again,” in *Philosophical Issues*, 29 [2019], 12).

<sup>148</sup> WOODARD, “Why Double-Check?” 7.

<sup>149</sup> FRIEDMAN, “Checking Again,” 6–7.

checker. This is even more noticeable in argumentation referring to human affairs. Moreover, it would be untenable to claim that the argumentation be built in an identical way for different agents.

In fact, the institution of the obligatory review was not aimed at the strengthening the moral certainty of a particular judge (though most likely many of them would double-check the correctness of the process of arriving at moral certainty), but was conceived as an institutional safeguard of the reliability of the pastoral action based on the decisions of ecclesiastical tribunals, which need to correspond to the truth. Therefore, an important distinction must be made. On the one hand, the operation of double-checking can be performed by the same person to achieve epistemic gains. However, it can also be conducted by another person. Indeed, the independent double check in the medical context requires that “[...] a second practitioner independently verifies that the dosage is correct; independently means without any input from the first practitioner.”<sup>150</sup> This strategy corresponds to what the law demanded before *Mitis Iudex*: to have all judgments first declaring the nullity of a marriage verified as to their correctness by independent agents.

When claiming the alleged benefits of this, now defunct, canonical discipline, there is a need to distinguish between a case remitted to ordinary examination in the new instance and a ratification of the decision of prior instance. If the case is admitted to ordinary examination, then double checking is rather easily explained as the decree of the appellate court admitting a case to an ordinary examination would normally entail a new instruction of the case and the tribunal of the higher instance “[...] is required to form its own, original moral certitude regarding the nullity of the marriage only if it renders a decision based on a modified set of proofs (i.e., following further instruction of the cause).”<sup>151</sup> That would definitely change the epistemic standing of the checker.

<sup>150</sup> K. BALDWIN and V. WALSH, “Independent Double-Checks for High-Alert Medications: Essential Practice,” in *Nursing*, vol. 44, no. 4 (2014), 65. “An independent double check requires two people to separately check each component of the work process. For example, a pharmacist calculates a dose, prepares a syringe of medication, and compares the product to the order; then, a nurse independently checks the order, calculates the dose, and compares the results with the dispensed product for verification. Two people are unlikely to make the same mistake if they work independently. If they work together or influence the checking process by suggesting what the checker should find, both could follow the same path to an error” (“Independent Double Checks: Undervalued and Misused: Selective Use of This Strategy Can Play an Important Role in Medication Safety,” <https://www.ismp.org/resources/independent-double-checks-undervalued-and-misused-selective-use-strategy-can-play> [12 July 2021]).

<sup>151</sup> K. LÜDICKE and R.E. JENKINS, *Dignitas Connubii: Norms and Commentary*, Washington, DC, Canon Law Society of America, 2006, 429.



On the other hand, if the case is to be confirmed by a decree, “[t]his requires the court to examine the sentence and its foundation in the acts. A collegial decision is then reached and a judgment in accord with [*Dignitas connubii*] Art. 248 is issued.”<sup>152</sup> The decision in this case is not a conclusion of an independent process leading towards a new act of eliciting moral certainty by the higher instance judges but rather a reasoned acceptance of the conclusions reached by the judges of prior instance.<sup>153</sup> Therefore, the judges of the appeal tribunal do not replicate the whole argumentation of the prior instance decision but consider the formal canonical correctness of the procedure followed at prior instance and the substantive elements of the case, including the question of legitimacy and conclusiveness of the proofs and the correctness of the application of the substantive law.<sup>154</sup> Consequently, also the ratification of the prior instance judgment has a distinct epistemic value.

Therefore, there are some epistemic gains in checking the results of complex reasoning structures in canonical procedures. Of course, the question of pragmatism is always lurking in the background. The pragmatic approach is therefore considered an “[...] interplay between potential epistemic gains and the practical costs that come with making those gains.”<sup>155</sup> In practical matters, one cannot pursue—should we say, incessantly?—all possible justifications of a claim. Legal procedures are not aimed at an unbounded broadening of the knowledge about a certain state of affairs. However, in order to be assured that the judicial decisions are ultimately based on the truth of a matter, reasonable demands need to be imposed.

Is there, however, any logical justification of checking the conviction of someone who has acquired the highest possible justification of the claim, that is certainty, and in the case of ecclesiastical judicial decisions, moral certainty? Yes, the judge is to acquire moral certainty in order to render the judgment. However, moral certainty is a state of mind which is linked to a specific person and his/her way of arriving at it. It is entirely possible, then, that the judge has moral certitude as to the matter at stake, but is objectively wrong in his conclusion as his interpretation of the facts and the law, and his argumentation can be a failure. Still the judge is subjectively confident (has moral certitude) that what he has determined is (objectively) true.

It was shown that even a double-checking on the part of the initial inquirer (the judge issuing the judgment first declaring the nullity of a marriage) can

<sup>152</sup> Ibid., 426.

<sup>153</sup> See *ibid.*, 427.

<sup>154</sup> See *ibid.*, 429.

<sup>155</sup> FRIEDMAN, “Checking Again,” 4.

bring some epistemic goods. But this inquirer could decide that those additional epistemic goods may not be necessary or even useful. The canonical discipline involved, therefore, the participation of distinct inquirers, i.e., judges in higher instance. The purpose of having the obligatory review was ultimately pastoral: to enable the ecclesiastical authority to find out that the conclusion reached by the first instance judge(s) gives sufficient assurance to act upon it in pastoral practice. Here the theory of pragmatic encroachment may be invoked. It states that “*S* knows that *p* if and only if no epistemic weakness vis-à-vis *p* prevents *S* from properly using *p* as a reason for action.”<sup>156</sup>

The issue whether pragmatic encroachment can bear on the process of knowing is not settled yet in epistemology, but whatever conclusion to this theoretical dilemma is found, one can state that in high-stake cases the acting agent will look for additional evidence.<sup>157</sup> Undoubtedly, one can find “high-stakes context” cases in which the agent would be “[...] rationally required to double-check despite knowing.”<sup>158</sup> Here the medical profession furnishes some useful examples. The nurse can be perfectly certain that the medication that she is going to dispense is the one prescribed for the patient and the dose is right; nevertheless, it is checked by another person. Does this checking process bear on the knowledge of the first nurse that this specific medication is to be applied to the given person in the specific dose? No, but the belief that what she knows as being correct is strengthened and the corporate responsibility of medical provider is satisfied to a greater degree. Indeed, “[c]onducting an independent double-check (IDC) when administering high-alert medications is one intervention used to ensure the patient receives medication in the safest manner possible.”<sup>159</sup> Although independent double checks have been criticized for being burdensome for practitioners overwhelmed by their duties and accused of low effectiveness in finding mistakes,<sup>160</sup> nevertheless “[p]resent research supports the idea that IDCs are an effective patient safety strategy”<sup>161</sup> and constitute a crucial patient safety practice.<sup>162</sup>

<sup>156</sup> Art. “The Analysis of Knowledge, 12. Pragmatic Encroachment,” in *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/knowledge-analysis/#PragEncr> (29 July 2021).

<sup>157</sup> This does not have to be any evidence in the sense used in procedural law, i.e., additional data gathered for the purposes of reasoning, but some additional assurance for safe acting.

<sup>158</sup> WOODARD, “Why Double-Check?” 31.

<sup>159</sup> BALDWIN and WALSH, “Independent Double-Checks for High-Alert Medications,” 65.

<sup>160</sup> See “Independent Double Checks,” <https://www.ismp.org/resources/independent-double-checks-undervalued-and-misused-selective-use-strategy-can-play> (12 July 2021).

<sup>161</sup> BALDWIN and WALSH, “Independent Double-Checks for High-Alert Medications,” 65.

<sup>162</sup> *Ibid.*, 67.

The pastoral action is supposed to be deliberate and based on reasonable grounds. It cannot be denied that the determination of the marital status of the faithful is of great importance. The question of what is at stake when considering a certain human action finds its place in epistemological reflection.

In an ordinary case, when the stakes are low—you're sitting in your front room relaxing—you are justified in believing, on the basis of memory and induction, that your car is parked in your driveway. But if you were to have this same evidence concerning the whereabouts of your car when your action would save or jeopardize lives depending on whether your car was there or not, and you had time to check before acting, you ought to go check.<sup>163</sup>

Whatever could be said about the motives for introducing the obligatory review, from the epistemological point of view it could not be considered a sign of distrust of ecclesiastical tribunals but rather a recognition of some objective epistemic conditions. It seems that this attitude is also present in other areas of human action; in the medical context it is stressed that "[...] IDCs aren't implemented to question clinicians' competence; instead, they're a safety strategy to help mitigate the complexity of medication administration."<sup>164</sup> It is interesting to note that "[...] some nurses think that performing an IDC will lead to *more* errors; they believe that if they rely on their colleagues to catch problems, they won't be as diligent in checking their own work." Still others "[...] don't perform an IDC because they 'trust' their colleague's initial judgment."<sup>165</sup> This resembles the objections that the obligatory review lowers the standards of judgments in first instance tribunals or that second instance tribunals just put their stump on first instance sentences. Nevertheless, medical profession finds the double check to be an effective strategy despite of those two objections, admitting therefore that the problem is not as pervasive as to cancel the benefits of the double check.

It is interesting to note a certain similarity of problems faced by medical practitioners and those encountered within ecclesiastical tribunals. Both systems seem to cope with heavy workload issues; therefore, it is postulated that "[...] independent double checks should only be used for very selective high-risk tasks or high-alert medications (not all) that most warrant their use. [...] Lack of time to carry out the checking process properly was a strong, recurring theme in studies of failed double checks and staff resistance to this

<sup>163</sup> J. FANTL and M. MCGRATH, "Evidence, Pragmatics, and Justification," in *The Philosophical Review*, vol. 111, no. 1 (2002), 85.

<sup>164</sup> BALDWIN and WALSH, "Independent Double-Checks for High-Alert Medications," 66.

<sup>165</sup> *Ibid.*

strategy.”<sup>166</sup> On the other hand, the use of double checks should not be a substitute for the necessary redesigns of the system that could more effectively prevent errors, including “[...] strategies with higher leverage—use of barriers, improving access to information, standardization, and automation [...]”.<sup>167</sup> The medical profession does not seem to abandon the procedure of double-checking, but rather tries to perfect it, not excluding simplification and automatization. The recognition of the fallibility of human beings is not questioned, but the strategy of responding to the reality is being debated. This is an acknowledgement that it concerns “high stake cases.”

What has, then, changed that the legislator chose to suppress the obligatory review? Were the canonical instruments of arriving at moral certainty perfected to the point that they substantially lessened the danger of error? Or, were the human conditions changed, obviously not, or the morale of the personnel?<sup>168</sup> It would be risky to claim the latter without somehow denigrating the dedication of prior generations of tribunal officers to their task. But perhaps the level of canonical preparation has increased? It seems, therefore, that for a more thorough assessment of the ecclesial effects of the new discipline, some tangible evidence of what is really happening on the ground would need to be collected.

In any case, the thesis that the obligatory review was not serving a rational purpose does not seem to satisfy the epistemic demands: “[...] double-checking can be good epistemic practice because it can be good epistemic practice to questions our beliefs. We are reflective subjects and we regularly engage in epistemic review and revision; or at least we should. Part of that process may involve putting back up to question something we already believe or even know. The good and reasonable epistemic subject doesn’t only care about belief formation but cares about epistemic maintenance as well. Double-checking is an important part of that maintenance project.”<sup>169</sup> It seems, however, that this approach is no longer as prominent a part of the marriage nullity procedure as it was before. Instead of perfecting or perhaps simplifying the process of obligatory review, it was suppressed altogether.

<sup>166</sup> “Independent Double Checks,” <https://www.ismp.org/resources/independent-double-checks-undervalued-and-misused-selective-use-strategy-can-play> (12 July 2021).

<sup>167</sup> See *ibid.* Obviously, in the process of dispensing medicine, some fairly simple checks, like barcode scanning may be employed with good effects. In more complex issues, however, the idea of system improvements seems to be desirable.

<sup>168</sup> “If the derogation was based merely on the empirical information gathered from local tribunals, it would seem that the consistent experience of the aforementioned apostolic tribunals was not duly weighed” (DANIEL, “An Analysis of Pope Francis’ 2015 Reform of the General Legislation Governing Causes of Nullity of Marriage,” 453).

<sup>169</sup> FRIEDMAN, “Checking Again,” 12.

### *Conclusions*

The 1983 Code called for the obligatory review of all judgments which have first declared the nullity of a marriage. The rationale behind this demand was to safeguard the truth in the assessment of the existence (or rather non-existence) of the marriage bond and the ecclesial consequences of such a finding. To an external observer, the obligatory review could easily appear as an expression of the Church's conviction that the determination of the reality of the bond is, simply speaking, important, while the abolition of the obligatory review may provoke a conclusion that it is no longer as important as it used to be. Questions about the credibility of the legal system might be then asked.

Commentators on *Mitis Iudex* observe that only time will tell what this procedural change will bring to the marriage nullity processes themselves and to ecclesial life. It is rather clear that the tribunal operations will gain on functional effectiveness as intended in the reform of *Mitis Iudex*. One can, however, wonder about other possible consequences. Probably they will not be perceived in an equal measure by every member of the Church, but only by those affected by marriage nullity processes, both as the parties and tribunal officers. It seems that a certain message can be distilled from the reform. The prior discipline of the Church safeguarded, as far as humanely possible and feasible, the material truth about the status of a given marriage, trying to limit the risks of having persons bound by the valid bond of marriage permitted to enter a subsequent union due to a judgment erroneously declaring the nullity of their prior union. Now, the message seems to be that the celerity of the Church's processes is more important than the elimination of possible errors as to the marital status of persons. Granted, celerity is based on a pastoral argument of eliminating long delays in rendering judgments and dispensing justice promptly to those afflicted by their situation. It will always be a matter of prudential choice to what extent those two aspects of the marriage nullity procedure are to be reconciled. Could it be concluded that an unintended consequence of the procedural change is a corresponding change in the perception of the importance of the determination of the marital status of a person in the course of a marriage nullity procedure, in other words, that something which was previously considered to be a high-stake issue has become a lower-stake matter?

## ASSOCIATIONS OF THE FAITHFUL AND DIOCESAN RELIGIOUS INSTITUTES

BONNIE MACLELLAN

**SUMMARY** — The A. presents the pertinent canonical norms and principal requirements of the Apostolic See for an association of the faithful to be erected as a religious institute or society of apostolic life of diocesan right. Particular focuses of the discussion include associations of the faithful in general, clerical associations, the statutes of associations, and the responsibilities and competencies of the diocesan bishop.

**RÉSUMÉ** — L'A. présente les normes canoniques pertinentes et les principales exigences du Siège Apostolique pour qu'une association de fidèles soit érigée en institut religieux ou en société de vie apostolique de droit diocésain. La discussion porte en particulier sur les associations de fidèles en général, les associations cléricales, les statuts des associations et les responsabilités et compétences de l'évêque diocésain.

### *Introduction*

This paper presents some canonical aspects relevant to the transition of public associations of the faithful to religious institutes of diocesan right. New charisms that meet identified unmet needs in particular Churches are important gifts of the Spirit for the life of the universal Church. This requires of diocesan bishops discernment of perceived charisms or gifts of the Spirit presented by the Christian faithful in movements or associations, especially when they desire to mature into religious institutes or societies of apostolic life.<sup>1</sup> This is an expression of the diocesan bishop's teaching function in discerning true charisms from false ones, his sanctifying function in nurturing the gifts of the Spirit, and his governing function in both constituting a

<sup>1</sup> See R. McDERMOTT, "Associations of the Faithful Becoming Religious Institutes or Societies of Apostolic Life: Responsibilities of Diocesan Bishops (C. 579)," in *Jur*, 73 (2014), 439-462 (= McDERMOTT, "Associations").

juridic person and exercising vigilance over a diocesan right institute.<sup>2</sup> This effort will take focused time and prayer by bishops to gently discern and foster the growth and development of individual charismatic inspirations, which may lead to collective efforts to fulfill the faithful's baptismal commitment to further the mission of the Church and the realization of God's kingdom on earth.<sup>3</sup>

Over the course of his long career, Fr. Francis Morrissey, OMI, JCD provided canonical assistance to members of the faithful who came together to give expression to new charisms of consecrated life to meet changing needs in the Church. This paper is dedicated to his memory. It offers some canonical and practical considerations both for those who are called to these new institutes and for diocesan bishops, charged with discerning new expressions of God's Spirit in a particular Church.

## 1 — *From Inspiration to Recognition*

Expressions of consecrated life normally transition through four stages—inspiration, association, diocesan erection, and sometimes pontifical recognition—culminating in canon 579.<sup>4</sup> This canon was modified by the Holy Father on 1 November 2020 to require written permission of the Holy See before a diocesan bishop may validly issue a decree erecting a religious institute of diocesan right.<sup>5</sup> For the purposes of this paper, each stage will be discussed to address important considerations that will assist in the discernment process.

### 1.1 — The Notion of Charisms

The essential role of charisms, which are divinely granted and bear witness to the Church's nature, is recognized in the Church's tradition and teaching.<sup>6</sup>

<sup>2</sup> Ibid., 440.

<sup>3</sup> See SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church *Lumen gentium*, 21 November 1964, in AAS, 57 (1965), 5-75, English translation in FLANNERY1, no. 12, 363.

<sup>4</sup> See R. McDERMOTT, "Norms Common to All Institutes of Consecrated Life (cc. 573-606)," in CLSA *Comm2*, 743-769 (= McDERMOTT, CLSA *Comm2*).

<sup>5</sup> See FRANCIS, Apostolic Letter m.p. *Authenticum charismatis* amending canon 579 of the Code of Canon Law, 1 November 2020, at [www.vatican.va](http://www.vatican.va), English translation in ORE, no. 45, 6 November 2020, 4-5 (= *Authenticum charismatis*).

<sup>6</sup> See 1 Cor 12:4,7,11; Eph 1:11-12; Gal 5:22. All scripture references are from *The New American Bible*, Camden, NJ, Thomas Nelson Inc., 1971.

These gifts of the Spirit meet unique needs within the Church and the world. As noted by St. Paul, "There are different kinds of spiritual gifts but the same Spirit; there are different forms of service but the same Lord; there are different workings but the same God who produces all of them in everyone" (1 Cor 12:4-6). As gifts of the Holy Spirit, charisms are lived, deepened, safeguarded, and developed by the members of each religious institute, in harmony with the whole Church.<sup>7</sup>

Charisms are not simply a "secondary phenomenon in the life of the Church."<sup>8</sup> They are special graces distributed by the Spirit at will (1 Cor 12:11), as a lens through which all life experiences are interpreted and have meaning.<sup>9</sup> The notion of charisms is noted in *Lumen gentium*, no. 12: "The whole body of the faithful ... have an anointing that comes from the holy one. These gifts of the Spirit are bestowed on the people through the sacraments and the ministration of the Holy Spirit, leading them and enriching them with virtues. Charisms are gifts for the needs of the Church. The genuineness of charisms is judged by those who have charge over the Church."<sup>10</sup>

If all Christians are given special gifts from the Holy Spirit, Church history speaks to special charisms given to founders of religious institutes as "experiences of the Spirit,"<sup>11</sup> to be nurtured and developed. They find expression through apostolates which meet unique needs in the Church,<sup>12</sup> manifesting "the commandment of love ... as branches of the one vine integrated into the life of the Church."<sup>13</sup>

<sup>7</sup> See cc. 573, 578; cf. ST. JOHN PAUL II, Post-synodal Apostolic Exhortation on the Consecrated Life and Its Mission in the Church and the World *Vita consecrata*, 25 March 1986, nos. 5-12, in AAS, 88 (1996), 380-385, English translation in *Origins*, 25 (1996), 684-685 (= VC). See also SECOND VATICAN COUNCIL, Decree on the Up-to-date Renewal of Religious Life *Perfectae caritatis*, 28 Oct 1965 (= PC), in AAS, 58 (1966), 706, English translation in FLANNERY1, 615-616; CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES and the CONGREGATION FOR BISHOPS, Directives for Mutual Relations between Religious and Bishops in the Church *Mutuae relationes*, 14 May 1978 (= MR), in AAS, 70 (1978), English translation in CLD, vol. 9, 307.

<sup>8</sup> Y. CONGAR, *Power and Poverty in the Church Administration*, J. Nicholson (trans.), Baltimore, Helicon, 1964, 46.

<sup>9</sup> See J. GALANTE, "The Relationship of the Diocesan Bishop and Institutes of Pontifical Right," in *CLSAP*, 56 (1994), 90.

<sup>10</sup> See *Lumen gentium*, no. 12, FLANNERY1, 363-364.

<sup>11</sup> *MR*, no. 11, 307.

<sup>12</sup> See ST. POPE JOHN PAUL II, Apostolic Exhortation to Men and Women Religious on Their Consecration in the Light of the Mystery of the Redemption *Redemptionis donum*, 25 March 1984 (= RD), no. 15, in AAS, 76 (1984), 541-542, English translation *Apostolic Exhortation Redemptionis donum of His Holiness John Paul II: To Men and Women Religious on Their Consecration in the Light of the Mystery of the Redemption*, Ottawa, CCCB, 1984, 749.

<sup>13</sup> McDERMOTT, *CLSA Comm2*, 756.



## 1.2 — Recognizing God’s Spirit: Inspiration

As in all movements of the Holy Spirit, inspirations for such foundations must be evaluated by Church authority.<sup>14</sup> Not every initiative or work of good will is destined to be the beginning of a new religious institute. Criteria for discernment which diocesan bishops may want to consider are noted in the Directives for Mutual Relations between Bishops and Religious in the Church, *Mutuae relationes*. Bishops are responsible for “discerning the authenticity of each foundation ... seeking to foresee ... every indication of a credible presence of the Holy Spirit, both to receive His gifts with thanksgiving and consolation,” and to avoid “institutes [that] may be imprudently brought into being which are useless or lacking in sufficient resources.”<sup>15</sup> The term “charism” was used by St. Pope Paul VI, when he pointed to *fructus Spiritus Sancti* at work within the Church.<sup>16</sup> New charisms in the Church appear in response to new needs of God’s people and are an essential characteristic of the Church’s holiness. It is from this shared charismatic gift that the notion of associations of the faithful find their inspiration.

## 2 — Associations of the Faithful

The erection of associations of the faithful follows a defined process which assists diocesan bishops in discerning the authenticity and uniqueness the association believes will serve a particular Church. Initially, a group can become an association *de facto* (c. 200 § 1); it can only gradually be recognized by the diocesan bishop as a private association. Of critical importance is the reality that the diocesan bishop who makes the decision to grant juridical status to associations of the faithful cannot accomplish the necessary reviews by phone calls, faxes, emails, or simple paper trails. The seriousness of this decision demands periodic on-site visits to the group to ascertain its progress, review and assist with statutes, record the progress and quality and stability of the members including their dedication to the inspiration of the founder, their apostolic service and mutual relations with others serving in the diocese, and

<sup>14</sup> See S. HOLLAND, “New Institutes, Mergers and Suppression,” in R. JOYCE, C. DARCY, R. KASLYN, and M. SULLIVAN (eds.), *Procedural Handbook for Institutes of Consecrated Life and Societies of Apostolic Life*, Washington, D.C., CLSA, 31 (= HOLLAND, “New Institutes”).

<sup>15</sup> See *MR*, no. 51, English translation in FLANNERY1, 237.

<sup>16</sup> ST. POPE PAUL VI, Apostolic Exhortation on the Renewal of Religious Life according to the Teaching of the Second Vatican Council *Evangelica testificatio*, 29 June 1971 (= *ET*), no. 11, in AAS, 63 (1971), 504, FLANNERY1, 685-686.

their planning for ongoing financial security. Only through periodic visits and update reports can the bishop be sufficiently advised to discern the maturation of the group along the stages from private association (cc. 299, 322), to public association (cc. 312 § 1, 3°, 313), and eventually to a religious institute or society of apostolic right of diocesan right (cc. 579, 731).

## 2.1 — From Private to Public Associations of the Faithful

Vatican II noted that associations of the faithful can offer tangible expressions of the Holy Spirit's charismatic gifts to the Church. Members in private associations of the faithful freely agree among themselves to pursue the purposes mentioned in canon 299 § 1,<sup>17</sup> without prejudice to the prescript of canon 301 § 1. As such, they can remain private unless they have been established for the purposes of teaching Christian doctrine or promoting public worship,<sup>18</sup> or if the name *Catholic* is to be used.<sup>19</sup>

When approached to become a recognized association of the faithful, the diocesan bishop is encouraged to open a file at the chancery, referencing the founder and members of the association and including pertinent documents and information.<sup>20</sup> This file should incorporate any impediments which may be of particular importance if the association plans to be erected as a religious institute of diocesan right.<sup>21</sup>

<sup>17</sup> Canon 299 § 1. "By means of a private agreement made among themselves, the Christian faithful are free to establish associations to pursue the purposes mentioned in can. 298, § 1, without prejudice to the prescript of can. 301, § 1.

§ 2. Even if ecclesiastical authority praises or commends them, associations of this type are called private associations.

§ 3. No private association of the Christian faithful is recognized in the Church unless competent authority reviews its statutes."

<sup>18</sup> Canon 301 § 1. "It is for the competent ecclesiastical authority alone to erect associations of the Christian faithful which propose to hand on Christian doctrine in the name of the Church or to promote public worship, or which intend other purposes whose pursuit is of its nature reserved to the same ecclesiastical authority.

§ 2. Competent ecclesiastical authority, if it has judged it expedient, can also erect associations of the Christian faithful to pursue directly or indirectly other spiritual purposes whose accomplishment has not been sufficiently provided for through the initiatives of private persons.

§ 3. Associations of the Christian faithful which are erected by competent ecclesiastical authority are called public associations."

<sup>19</sup> Canon 300. "No association is to assume the name Catholic without the consent of competent ecclesiastical authority according to the norm of can. 312."

<sup>20</sup> See McDERMOTT, "Associations," 446.

<sup>21</sup> See cc. 642-645.

The association remains under the direct vigilance of the diocesan bishop. The law grants the diocesan bishop certain faculties regarding the association, as noted in canons 314-318. Canonists and Church authorities recognize the wisdom of proceeding slowly and cautiously to protect the best interests of both the diocese and the association.<sup>22</sup> When the diocesan bishop has discerned the charism, mission, and membership of an association as appropriate for recognition as a public association, he may erect the public association of the faithful in his territory by formal decree (c. 312 § 1, 3°). This decree should explicitly state that this association is destined to become a religious institute.<sup>23</sup>

## 2.2 — Statutes

To protect both the association and the Church, the proposed statutes of the new group require careful review. Statutes will include the site of the association's headquarters, basic governance structures, and conditions for members.<sup>24</sup> If the canonist working with the association and the founder perceives that the association may eventually mature into a public juridic person, the statutes also will require:

- A description of the members' common life and practices reflective of the evangelical counsels;<sup>25</sup>
- Evidence that the statutes have been shared with the members of the association, with their input included and their questions answered; and
- Evidence that the members have begun to practice the evangelical counsels, including some initial form of communal living.<sup>26</sup>

If the association increases to thirty-five members and the statutes are approved, the diocesan bishop may erect the association as a public association of the faithful (cc. 312 § 1, 3°, 313). Careful discernment is required prior to such a decision, because public associations can act in the name of the Church in carrying on its specific apostolates and ministries (cc. 301 § 1, 313). In this capacity, the temporal goods of a public association are ecclesiastical goods, subject to the norms found in Book V of the Code (c. 1257 § 1).

<sup>22</sup> See McDERMOTT, "Associations," 450.

<sup>23</sup> See HOLLAND, "New Institutes," 37.

<sup>24</sup> See McDERMOTT, "Associations," 447.

<sup>25</sup> Canon 607 § 2. "A religious institute is a society in which members, according to proper law, pronounce public vows, either perpetual or temporary which are to be renewed, however, when the period of time has elapsed, and lead a life of brothers or sisters in common."

<sup>26</sup> See McDERMOTT, "Associations," 447.

While new institutes often begin without formality, the association eventually will seek recognition from the Church, which affords it an opportunity to grow, clarify its identity, prove its stability and authenticity, and ensure that appropriate statutes or constitutions are written. Ecclesial recognition requires review of the association's statutes by a competent authority,<sup>27</sup> which cannot be simply copied from another association, because each institute has its own special founder(s), spirituality, history, nature, character, and purpose, which should be reflected in the statutes.<sup>28</sup> When reviewing statutes, the following components should be included:

- The juridic nature of the foundation: religious, secular, monastic, apostolic, clerical, lay.
- The end purpose the founder wishes to accomplish: Why is a new foundation called for? To what need does it respond?
- Spirituality: What values of the Gospel urge the founder and his/her followers? What are the characteristics of the spirituality, and how are they realized in the institute?
- The nature, end, and spirit that gives the institute a particular identity.

### **3 — Clerical Associations**

The Church recognizes the important ministry which can be offered by associations of the faithful that include diocesan clerics. These associations require the diocesan bishop's special attention. Canon 302 describes a clerical association, which must be under the direction of clerics who intend to exercise sacred orders. As with other associations of the faithful, they must be acknowledged as such by competent ecclesiastical authority.

It is important to differentiate between clerical associations (c. 302) and associations of clerics (c. 278). Building on the rights of all the Christian faithful to establish associations (c. 215), associations of clerics (c. 278) flow from the natural and baptismal rights of secular clerics to associate to promote holiness and foster unity with one another and the diocesan bishop. What differentiates associations of clerics from clerical associations is the foundation for their establishment. Clerical associations, as noted in canon 302, intend to carry on sacred ministry and meet needs of the Christian

<sup>27</sup> Canon 312 § 1. "The authority competent to erect public associations is ... 3° the diocesan bishop in his own territory, but not a diocesan administrator, for diocesan associations, except, however, for those associations whose right of erection has been reserved to others by apostolic privilege."

<sup>28</sup> See *LG* 43; *PC* 1.

faithful. It is important that clerics not simply join an association without the consent of the diocesan bishop, because the law does not provide for clerical associations to incardinate clerics.<sup>29</sup>

### 3.1 — Responsibilities of the Diocesan Bishop

The diocesan bishop who sponsors and erects a clerical association as a public juridic person assumes significant responsibilities. If the diocesan bishop accepts the responsibility for ordaining and provisionally incardinating clerical members of an association into his diocese (c. 265), he must ensure the following:

- Receipt of testimony of the major moderator of the association and the formation personnel of the suitability of the candidate for ordination;
- Candidate appropriateness—e.g., free of irregularities or impediments;
- Confirmation that the candidate attended a major seminary;
- Proof that the formation included education on the spirituality and life of the association;
- Documentation of frequent contacts between the diocesan bishop and the moderator of the association, ensuring appropriate monitoring of the members in keeping with the laws for the formation/education of those called to ordination (cc. 649 § 3; 736 § 2).<sup>30</sup>

There should be a written agreement between the diocesan bishop and the founder/moderator of the association, which includes the following:

- Assurance of the members' formation during the associative phase;
- Vigilance and oversight of the diocesan bishop over formation and academic programs of the members;
- A plan for the presence and service of the clerics in the diocese during the period of provisional incardination;
- Financial arrangements, especially if the diocese is assisting with the costs of studies of the students;
- Provisions for the separation of members.<sup>31</sup>

### 3.2 — Statutes of Clerical Associations

The statutes of diocesan clerical associations differ from statutes of associations of the faithful that are on the way to becoming a religious institute

<sup>29</sup> See McDERMOTT, "Associations," 451.

<sup>30</sup> See McDERMOTT, "Associations," 453.

<sup>31</sup> Ibid.

or society of apostolic life. Specifically, they must include the requirements necessary for men aspiring to sacred orders, including the following:

- Confirmation that candidates are free from irregularities or impediments for ordination;
- Candidates are able to understand the philosophical and theological studies in major seminaries;
- Qualities required for ordination to the diaconate and presbyterate.<sup>32</sup>

The statutes can form the foundation for the constitution of a religious institute or society of apostolic life and will share many of the fundamental norms required of any association of the faithful, including:

- Description of the association's patrimony (nature, character, spirit, goals, or ends);
- Governance structures;
- Provision for temporal goods;
- Admission and formation of candidates and profession/incorporation/incardination of clerical member;
- Provision for ordination;
- Rules and obligations of the members;
- Ministerial service of the institute;
- Separation of members;
- Universal canonical norms (cc. 607-704).<sup>33</sup>

The statutes of a clerical association must reference issues related to separation, including the fact that clerics who voluntarily depart from the institute or are dismissed from it must seek a benevolent bishop (c. 693). However, this bishop is under no obligation to incardinate the departing cleric. Should the diocesan bishop do so, he becomes solely responsible for the cleric.<sup>34</sup>

#### **4 — *From Public Associations to Diocesan Institutes***

Ecclesiastical approval of a public association of the faithful presumes that it may eventually become an institute of consecrated life or society of apostolic life. To ensure sufficient knowledge of the association, the diocesan bishop will seek information that will confirm the association's gift to the diocese and to the Church, the formation of its members, and assurance that the association

<sup>32</sup> See McDERMOTT, "Associations," 453.

<sup>33</sup> Ibid., 455.

<sup>34</sup> Ibid., 454.

has the necessary resources to fulfill its mission.<sup>35</sup> Normally, the diocesan bishop will see evidence in the members of being witnesses to the charismatic lifestyle described by the founder(s), dedication to the particular Church, perseverance in their call, and evidence of gradual financial stability.<sup>36</sup>

A well-established association will often seem like a diocesan institute of religious life, while not enjoying full rightful autonomy, especially as it relates to governance.<sup>37</sup> However, to avoid erection of new diocesan institutes without sufficient discernment to determine the authenticity and need for the institute's particular charism, the requirement of a *nihil obstat* from the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL) has been clarified:

The Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, aware that every new Institute of consecrated life even when it comes into being and develops within a Particular Church is a gift for the whole Church, and acknowledging the need to prevent new Institutes from being established on the diocesan level that lack the proper discernment and to ascertain the true origin of each charism that would define the specific features that would receive consecration by the profession of the evangelical counsels and that would identify its scope for development, has indicated the desirability of determining its future role better, as established in canon 579 of the CIC, by consulting the opinion of this Congregation before proceeding with the establishment of a new diocesan Institute.<sup>38</sup>

Just four years later, Pope Francis further clarified this norm by modifying canon 579.

The Apostolic See has the responsibility to accompany the Pastors in the process of discernment leading to the ecclesial recognition of a new Institute or a new Society under diocesan law. The Apostolic Exhortation *Vita*

<sup>35</sup> Canon 305 § 1. "All associations of the Christian faithful are subject to the vigilance of competent ecclesiastical authority which is to take care that the integrity of faith and morals is preserved in them and is to watch so that abuse does not creep into ecclesiastical discipline. This authority therefore has the duty and right to inspect them according to the norm of law and the statutes. These associations are also subject to the governance of this same authority according to the prescripts of the canons which follow. § 2. Associations of any kind are subject to the vigilance of the Holy See; diocesan associations and other associations to the extent that they work in the diocese are subject to the vigilance of the local ordinary."

<sup>36</sup> See McDERMOTT, "Associations," 448.

<sup>37</sup> Canon 586 § 1. "A just autonomy of life, especially of governance, is acknowledged for individual institutes, by which they possess their own discipline in the Church and are able to preserve their own patrimony intact, as mentioned in can. 578. § 2. It is for local ordinaries to preserve and safeguard this autonomy."

<sup>38</sup> SECRETARIAT OF STATE, Rescript *ex audientia* concerning canon 579 of the Code of Canon Law on the erection of a diocesan institute, 11 May 2016, in AAS, 108 (2016), 584-585.

*consecrata* states that the vitality of new Institutes and Societies “must be judged by the authority of the Church, which has the responsibility of examining them in order to discern the authenticity of the purpose for their foundation and to prevent the proliferation of institutions similar to one another, with the consequent risk of a harmful fragmentation into excessively small groups” (n. 12). The new Institutes of Consecrated Life and the new Societies of Apostolic Life, therefore, must be officially recognized by the Apostolic See, which alone has final judgement .... With this in mind, I have decided to modify can. 579, which is replaced by the following text: *Episcopi dioecesani, in suo quisque territorio, instituta vitae consecratae formali decreto valide erigere possunt, praevia licentia Sedis Apostolicae scripto data*.<sup>39</sup>

#### 4.1 — Specific Requirements of the Apostolic See

The newly formulated canon 579 says that diocesan bishops can validly establish by formal decree institutes of consecrated life in their own territories with the previous permission of the Apostolic See given in writing. In order to obtain this prior written permission, needed for the validity of the decree of erection, some specific information is required by CICLSAL:<sup>40</sup>

- The names of the founder(s) and first General Superior, including a brief curriculum vitae of each;
- A historical-juridical account of the institute from its beginnings, including a copy of the documents by which the ecclesial authority first approved it;
- The decree of erection of the association of the faithful;
- Six copies<sup>41</sup> of the constitutions and directory of the institute;
- Two copies of the book of prayers, ceremonials, etc;<sup>42</sup>
- A picture of the religious dress of both professed members and novices, where applicable;
- Current statistics regarding membership, including the year of birth and date(s) of temporary and perpetual profession for each member;<sup>43</sup>
- A listing of houses (except for societies of apostolic life);
- A listing of the places and dioceses where the members are located, as well as the works of the institute;

<sup>39</sup> *Authenticum charismatis*; English translation in *ORE*, 6 November 2020, 4-5.

<sup>40</sup> See HOLLAND, “New Institutes,” 39.

<sup>41</sup> See McDERMOTT, “Associations,” 456.

<sup>42</sup> *Ibid.*

<sup>43</sup> New diocesan right congregations will normally require a minimum of forty or fifty members, with the majority having pronounced perpetual commitment of vows or definitive incorporation, as provided by the constitution.



- Proof of stability, with the capacity to persevere and grow in the service of the people of God;
- An account of financial patrimony including a declaration of debts;<sup>44</sup>
- Statements addressing any extraordinary facts related to the institute (e.g., reports of visions), particular devotions or exercises of piety specific to the institute, and a list of other institutes in the diocese that have the same name and purpose.

Two hundred dollars is to be forwarded with the documentation as a deposit for the expenses of the entire process.<sup>45</sup>

If the members serve in other dioceses, testimonial letters must be sent from the bishops of those dioceses. These testimonial letters must be sent directly to the Holy See, giving the opinion of these diocesan bishops about the following: the usefulness of the association (*PC* 19), its stability and discipline, the formation of the members, the institute's internal governance and administration of goods, its liturgical and sacramental dimensions, and the association's sense of being with the Church particularly in its observance of ecclesial discipline as expressed in the common law of the Church and diocesan directives.

The consultation by the diocesan bishop with final written permission of CICALSAL prior to the erection of a religious institute of diocesan right is for the validity of the erection of the institute. Once erected, these institutes remain under the special vigilance of the diocesan bishop.<sup>46</sup> One should note that, while religious institutes of diocesan right can be erected by the diocesan bishop after receiving written permission of the Holy See, they may only be suppressed by the Holy See.<sup>47</sup>

## 4.2 — Competencies of the Diocesan Bishop

Once an association has been erected as a diocesan religious institute, the responsibilities of the diocesan bishop do not cease.<sup>48</sup> He must exercise

<sup>44</sup> Official financial statements are not required, but a statement of the diocesan bishop which indicates the Association enjoys financial autonomy and can support its members and works of the institute is required. *Ibid.*, 442. See also *PC* 19.

<sup>45</sup> See HOLLAND, "New Institutes," 39.

<sup>46</sup> Canon 594. "Without prejudice to can. 586, an institute of diocesan right remains under the special care of the diocesan bishop."

<sup>47</sup> Canon 584. "The suppression of an institute pertains only to the Apostolic See; a decision regarding the temporal goods of the institute is also reserved to the Apostolic See." See McDERMOTT, "Associations," 457.

<sup>48</sup> See McDERMOTT, "Associations," 459.

continued vigilance and authority over the canonical institute that he had assisted in attaining diocesan right status in the Church. Ongoing involvement of the diocesan bishop is necessary in a variety of situations. In particular, the bishop has the following competencies:

- matters reflective of internal affairs of the institute, including changes to the constitutions (cc. 587 § 2; 595 § 1);
- dispensation from norms noted in the constitutions in particular cases (c. 595 § 2);
- affairs of greater importance beyond the competence of the major superior (c. 595 § 1);
- presiding at the election of the supreme moderator (c. 625 § 2);
- canonical visitation (c. 628 § 2);
- supervision of temporal goods, consent for alienations and other transactions that could worsen or jeopardize the patrimonial condition of the institute (cc. 637, 638 § 4);
- granting permission for members to manage others' temporal goods that demand an account or incur debt (cc. 285 § 4, 672);
- granting permission for the erection of an oratory in a house after careful examination of the site (cc. 1223, 1224 § 1);
- confirmation of a decree of voluntary departure for one in temporary profession (c. 686 § 1);
- extensions of exclaustation of more than three years for members in perpetual profession (c. 686 § 1);
- issuance of a decree of imposed exclaustation on a member in perpetual profession at the request of the supreme moderator (c. 686 § 3);
- granting an indult of departure (c. 691 § 2);
- confirmation of a decree of dismissal for one in perpetual profession (c. 700).

### *Conclusion*

The importance of discerning particular gifts of the Holy Spirit and monitoring their spiritual and canonical maturation as it attains legal status with permanence in the Church demands careful attention of the diocesan bishop and an attitude of openness on the part of the founder and those assisting in this journey of grace.<sup>49</sup> The importance of diligence and maintenance of files during the embryonic state of the association including goals, statutes, and

<sup>49</sup> See MCDERMOTT, "Associations," 461.

regular periodic visits and reviews by the diocesan bishop or his delegate will assist in the eventual discernment of the group's understanding of the serious undertaking they are assuming in a particular Church. For his part, the diocesan bishop has been blessed with God-given authority and pastoral care for all who are entrusted to him, including discernment of true gifts of the Spirit, encouraging its fledgling beginnings, and assisting in the association's attaining juridic status in the diocese entrusted to him. Such an evolutionary process, by its very nature, must be slow, gradual, and monitored.<sup>50</sup> In this journey, the diocesan bishop can both support the movements of the Holy Spirit and ensure that the purpose of all religious institutes in the diocese continue to contribute to the life and holiness of the particular Church (cf. c. 576).<sup>51</sup>

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*May those who have been blessed by Fr. Morrissey's wisdom and friendship continue to fulfill the call of the final canon of the Code that the salvation of souls, which is the supreme law of the Church, always be kept before our eyes (c. 1752). Requiescat in pace.*

<sup>50</sup> Ibid., 460.

<sup>51</sup> "Formal erection as an institute of consecrated life of diocesan right presents the institute as an authentic expression of the gospel empowered to carry on its apostolate in the name of the Church. It remains the responsibility of the diocesan bishop to guide and encourage the growth of the institute in accordance with its proper nature, spirit and end." R. McDERMOTT, "Norms Common to All Institutes of Consecrated Life [cc. 573-606]," in *CLSA Comm2*, 748.

# LA RÉPRESSION DE LA PÉDOPORNOGRAPHIE EN DROIT CANONIQUE, EN DROIT CRIMINEL CANADIEN ET DANS LES INSTRUMENTS JURIDIQUES INTERNATIONAUX

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**RÉSUMÉ** — Cet article présente et analyse le crime de pédopornographie en droit canonique, en droit criminel canadien ainsi que dans quelques instruments juridiques internationaux. L'auteur met en exergue les différentes sanctions prévues par lesdits législateurs et, dans une approche comparative, souligne certains éléments de similitude et de dissimilitude entre le droit canonique et le droit criminel canadien en matière de répression de la pornographie infantile.

**SUMMARY** — This article presents and analyses the crime of child pornography in canon law, in Canadian criminal law as well as in some international legal instruments. The author highlights the different sanctions provided by said legislators and, in a comparative approach, underlines certain elements of similarity and dissimilarity between canon law and Canadian criminal law in the repression of child pornography.

## *Introduction*

L'accessibilité et la distribution de la pornographie juvénile<sup>1</sup> à travers le réseau informatique mondial qu'est Internet ont atteint des proportions

<sup>1</sup> Les textes légaux laissent apparaître une différence de terminologies : pornographie « infantile », pornographie « juvénile ». Dans cet article, nous utilisons le terme pédopornographie (qui renvoie au mot « pédo » qui veut dire en grec « enfant » et « pornographie ») pour qualifier la pornographie impliquant des personnes mineures de moins de dix-huit ans. Aussi l'usage dans cet article des expressions pornographie « infantile » ou « juvénile » indiquera la pornographie mettant en scène des mineurs de moins de dix-huit ans. Par ailleurs, au moment où nous achevons la rédaction de cet article, est publié le 1<sup>er</sup> juin 2021, la version reformée tant attendue du livre VI du *CIC/83*. En effet, par la Constitution

alarmantes depuis le milieu des années 1990 lorsque des personnes pédophiles ont commencé à utiliser ce média pour partager des contenus sexuellement explicites<sup>2</sup>. L'encadrement juridique de la pornographie juvénile semble être une action assez récente des différents organes législatifs des États. Ce n'est que vers la fin des années 1970 que l'Angleterre, le Pays de Galles et les États-Unis d'Amérique émettent des lois pour lutter contre la pédopornographie<sup>3</sup>. L'incrimination de cette dernière s'est développée à partir de la législation sur les publications obscènes relatives à la pornographie<sup>4</sup>. La notion d'obscénité est l'équivalent de celle de « bonnes mœurs » en droit français.

L'usage des notions d'obscénité et de bonnes mœurs pour signifier la pornographie montre combien il a toujours été difficile d'apporter une définition légale au terme pornographie<sup>5</sup>. Cette difficulté à lui trouver une

Apostolique *Pascite gregem Dei*, du 23 Mai 2021, le Pape François promulgue le texte révisé du livre VI du *CIC/82* et fixe son entrée en vigueur pour le 8 décembre 2021, [https://www.vatican.va/content/francesco/la/apost\\_constitutions/documents/papa-francesco\\_costituzione-ap\\_20210523\\_pascite-gregem-dei.html](https://www.vatican.va/content/francesco/la/apost_constitutions/documents/papa-francesco_costituzione-ap_20210523_pascite-gregem-dei.html) (04 juin 2021). Cet article prend en compte les récents changements effectués par le législateur pénal canonique en matière de crimes pédopornographiques. La version française et celle latine du nouveau livre VI sont celles disponibles sur le site du Vatican, [https://www.vatican.va/archive/cod-iuriscanonici/fra/documents/cic\\_libro6\\_fr.pdf](https://www.vatican.va/archive/cod-iuriscanonici/fra/documents/cic_libro6_fr.pdf) (05 Juin 2021).

<sup>2</sup> Voir Y. AKDENIZ, *Internet Child Pornography and the Law: National and International Responses*, London, Routledge, 2016, 1-3 (= AKDENIZ, *Internet Child Pornography and the Law*).

<sup>3</sup> Voir A. ADLER, « The Perverse Law of Child Pornography », dans *Columbia Law Review*, 101 (2001), 210; AKDENIZ, *Internet Child Pornography and the Law*, 9; I. O'DONNELL et C. MILNER, *Child Pornography: Crime, Computers and Society*, London, T&F eBooks, 2007, 3-7.

<sup>4</sup> Voir A. GILLESPIE, « Legal definitions of Child Pornography », dans *Journal of Sexual Aggression*, 16 (2010), 27, 30 (= GILLESPIE, « Legal definitions »).

<sup>5</sup> Voir C. VALLET, La protection des mineurs face à la cyberpédopornographie : Étude comparée entre le droit criminel canadien et français, thèse de Doctorat, Université de Montréal, 2009, 64-90 (= VALLET, La protection des mineurs). Vallet commente aux pages 69-70 la définition de la pornographie donnée par le juge Sopinka, dans l'arrêt R. c. Butler, [1992] 1 R.C.S. 452; 1992 IIJCan 124 (C.S.C.). Pour ce juge, la pornographie peut être divisée en trois catégories. La première concerne « les choses sexuelles explicites, accompagnées de violence » ; la deuxième, « les choses sexuelles explicites, non accompagnées de violence, mais qui assujettissent des personnes à un traitement dégradant ou déshumanisant » ; la troisième catégorie renvoie aux « choses sexuelles explicites, non accompagnées de violence, qui ne sont ni dégradantes ni déshumanisantes ». Seules les deux premières catégories causeraient un certain préjudice à la société, selon le critère de la « norme sociale de tolérance ». Par contre, il existe une différence entre obscénité et pornographie, puisque toutes les choses obscènes ne sont pas forcément pornographiques. Le Conseil d'État français par exemple, en 1979 définit comme film à caractère pornographique « le film qui présente au public, sans recherche esthétique et avec une crudité provocante des scènes de la vie sexuelle et notamment des scènes d'accouplement ». CE, 13 juil. 1979, Ministre de la Communication c. S.A. Le Comptoir français et Société Les productions du Chesne, GP.1981.I.321; Gaz.Pal. 1981.J.321.

définition s'est rencontrée aussi bien au niveau légal que littéraire et artistique ; laissant, après des débats enflammés, la responsabilité de sa définition au juge<sup>6</sup>. On comprend alors pourquoi le juge américain, Potter Stewart, en 1964 affirmait qu'il ne savait pas définir la pornographie, mais pouvait la reconnaître quand il la voyait<sup>7</sup>. Tout comme la pornographie, la pédopornographie n'est pas aisée à définir<sup>8</sup>. Elle est un phénomène bien complexe qui pose des questions tant au point de vue moral, juridique, psychopathologique que criminologique<sup>9</sup>. Pourtant, la répression de la pédopornographie, du point de vue du principe de la légalité, suppose sa définition légale préalable en des termes clairs et précis<sup>10</sup>. Comment les législateurs pénaux définissent-ils et punissent-ils de tels actes perçus par beaucoup comme étant atypiques et irrationnels ? Telle est la question qui nous préoccupe. Prenant en compte le nombre de pages limité octroyé à cet article, nous nous essayerons à saisir les éléments constitutifs du délit<sup>11</sup> de pornographie infantile

<sup>6</sup> Voir E. ALT (ed.), *Le sexe et ses juges*, Paris, Syllepse, 2006, 15.

<sup>7</sup> Voir *Jacobellis v. Ohio*, (1964) 378 U.S. 184 : « I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that ».

<sup>8</sup> Voir M. SETO, *Internet Sex Offender*, Washington, American Psychological Association, 2013, 37-38. L'auteur affirme que la définition de la pornographie infantile est d'autant plus compliquée que les lois ne font généralement pas de distinction entre les catégories d'âge du développement. Les lois du Canada et des États-Unis définissent la pornographie infantile comme toute représentation sexuelle de personnes âgées de moins de 18 ans, ce qui signifie que les images de personnes sexuellement matures de moins de 18 ans qui ont atteint ou dépassé l'âge légal de consentement aux relations sexuelles sont légalement considérées comme équivalentes aux images de jeunes adolescents, d'enfants en âge de puberté ou d'enfants prépubères. La seconde complication pour la définition de la pédopornographie est liée à la définition, par la loi, du seuil de la pédopornographie (= SETO, *Internet Sex Offender*).

<sup>9</sup> Voir S. PRAT, « Analyse qualitative de rapports d'expertise psychiatrique concernant des faits de pornographie infantile », dans *Annales Médico-Psychologiques*, 173 (2015), 149.

<sup>10</sup> Le principe général de légalité des délits et des peines est basé sur le droit humain positif et est résumé dans la formule latine *nullum crimen, nulla poena sine praevia lege poenali*. Le principe de légalité est la règle cardinale, la clé de voûte du droit pénal. Il signifie, en matière pénale, qu'aucun acte ne peut être considéré comme un « délit » et sanctionné comme tel, si, au moment de son accomplissement, il n'existe pas de texte érigeant cet acte en délit et fixant les peines qui lui sont applicables. Ce principe est un fondement et une partie intégrante du système canonique. Voir W. DANIEL, « The Principle of Legality in Canon Law », dans *Jur*, 70 (2010), 29 : « The principle of legality is foundational and integral to the canonical order; it is an ever-relevant point of reference for canonical scholars and practitioners » ; P. TOXÉ, « Quel principe de légalité en droit canonique ? », dans *AC*, 56 (2004/2015), 236-248 ; B.T. Austin, « *Nullum crimen, nulla poena sine lege*: the Principle of Penal Legality in the *Ius Vigens* », dans *StC*, 54 (2020), 5-29.

<sup>11</sup> Nous utiliserons pour le droit canonique le terme de délit (*delictum*) qui sera le synonyme de crime (*crimen*) en droit criminel canadien et en droit international. Pour l'histoire des

aussi bien en droit canonique, en droit criminel canadien que dans quelques instruments juridiques internationaux. Ensuite, nous mettrons en relief les différentes sanctions prévues par lesdits législateurs et enfin nous soulignerons, autant que possible, quelques points saillants de comparaison entre le droit canonique et le droit criminel canadien en la matière.

## 1 — *Le délit de la pornographie infantile dans la législation canonique*

Le canon 1398 (nouveau) du *CIC/83*, classé parmi les délits contre la vie, la dignité et la liberté humaines, traite au § 1, 1<sup>o</sup> des délits « contre le sixième commandement du Décalogue avec un mineur ou une personne habituellement affectée d'un usage imparfait de la raison ou avec une personne à laquelle le droit reconnaît une protection similaire ». Au § 1, 2<sup>o</sup> le législateur pénal érige en infraction pénale le fait pour un clerc, de recruter ou d'induire lesdites personnes à s'exhiber ou à participer à des exhibitions pornographiques réelles ou simulées. De même, au § 1, 3<sup>o</sup>, commet un délit, le clerc qui acquière, détient, exhibe ou divulgue, de quelque façon que ce soit et avec quelque moyen que ce soit, de images pornographiques, acquises de façon immorale, des personnes susmentionnées. Le canon 1398 §2 fait de membres d'instituts de vie consacrée ou de sociétés de vie apostolique, et de n'importe quel fidèle qui jouit d'une dignité ou accomplit un office ou une fonction dans l'Église, des auteurs potentiels du délit de pédopornographie<sup>12</sup>.

deux terminologies, voir T. MOMMSEN, *Le Droit pénal romain*, t. 1, Paris, A. Fontemoing, 1907, 10 (= MOMMSEN, *Le Droit pénal romain*). Voir aussi GAIUS, *Institutes*, 3, 197 qui emploie le mot *crimen* à propos du vol « [...] extra furti crimen uideri ». Voir aussi *Digeste*, 9, 2, 30, 3 où le juriste Paul emploie le terme *crimen* à propos du dommage causé à la chose d'autrui. Mousourakis souligne que le terme *crimen* signifiait un acte illicite posé contre l'État ou l'ensemble de la communauté et était poursuivi et puni par les organes de l'État. Les délits par contre causaient un dommage aux personnes, à la propriété, à l'honneur ou à la réputation. Il reconnaît toutefois que les termes *crimen* et *delictum* se chevauchaient : « However, in Roman law the two concepts to some extent overlapped since the law of delicts, besides being concerned with compensation for the victims, sought also to inflict punishment on the wrongdoer. » Voir MOUSOURAKIS, *Roman Law*, 159.

<sup>12</sup> Voir *CIC/83*, c. 1398 (nouveau) : « § 1. Privatione officii et aliis iustis poenis, non exclusa dimissione e statu clericali, si casus id secumferat, puniatur clericus: 1<sup>o</sup> qui delictum committit contra sextum Decalogi praeceptum cum minore vel cum persona quae habitualiter usum imperfectum rationis habet vel cui ius parem tutelam agnoscit; 2<sup>o</sup> qui sibi devincit aut inducit minorem aut personam quae habitualiter usum imperfectum rationis habet aut eam cui ius parem tutelam agnoscit, ut pornographice sese ostendat vel exhibitiones pornographicas, sive veras sive simulatas, participet; 3<sup>o</sup> qui contra bonos mores sibi comparat, detinet, exhibet vel

Toutefois, bien que le canon 1398 énumère des pratiques ou des actes constitutifs du délit de pédopornographie, il ne définit pas ce qu'on entend par matériel pédopornographique.

Il faut pour cela se référer à la lettre sous forme de *motu proprio* “*Vos estis lux mundi*” (= *VELM*) du Pape François du 07 mai 2019<sup>13</sup>. Ce texte est entré en vigueur le 1<sup>er</sup> juin 2019 et contient des normes approuvées *ad experimentum* pour trois ans. Il s'applique aux clercs, à des membres d'Instituts de vie consacrée ou à des Sociétés de vie apostolique composées de clercs ou de laïcs, hommes ou femmes<sup>14</sup>. L'art. 1 § 1, a) iii de ce document ayant force de loi classe parmi les délits contre le sixième commandement du Décalogue le fait de « produire, exhiber, détenir ou distribuer, même par voie informatique, du matériel pédopornographique, ainsi que recruter ou inciter un mineur ou une personne vulnérable à participer à des exhibitions pornographiques ». Pour la première fois, dans une loi universelle, est déterminé ce qu'on entend par matériel pédopornographique : « Toute représentation, indépendamment du moyen utilisé, d'un mineur impliqué dans une activité sexuelle explicite, réelle ou simulée, et toute représentation d'organes sexuels de mineurs à des fins principalement sexuelles »<sup>15</sup>. La réalisation du délit de pornographie infantile suppose l'existence d'un élément matériel objectif, mais aussi la preuve de l'élément subjectif ou intentionnel.

### 1.1 — L'élément matériel du délit de pédopornographie

L'art. 6, 2 de la lettre apostolique *motu proprio*, *Sacramentorum sanctitatis tutela* (version rénovée de 2010), utilisait les termes : « l'acquisition, la détention ou la divulgation [...] d'images pornographiques de mineurs de moins de 14 ans de la part d'un clerc, de quelque manière que ce soit et quel

divulgat, quovis modo et quolibet instrumento, imagines pornographicas minorum vel personarum quae habitualiter usum imperfectum rationis habent. § 2. Sodalitatis instituti vitae consecratae vel societatis vitae apostolicae, et fidelis quilibet aliqua dignitate gaudens aut officio vel functione in Ecclesia fungens, si delictum committat de quo in § 1 vel in can. 1395, § 3, puniatur ad normam can. 1336, §§ 2-4, adiunctis quoque aliis poenis pro delicti gravitate ».

<sup>13</sup> Voir FRANÇOIS, Lettre Apostolique m.p. *Vos estis lux mundi*, 07 Mai 2019, texte original italien dans l'*OR* du 10 mai 2019, traduction française dans *DC*, 2535 (2019), 109-114 (= FRANÇOIS, *Vos estis lux mundi*). Ce texte doit être lu et interprété en parallèle avec la version rénovée de 2010 de la Lettre apostolique *motu proprio*, *Sacramentorum sanctitatis tutela*, 30 avril 2001, de JEAN PAUL II ainsi que le Rescrit *ex audientia Sanctissimi* du 03 Décembre 2019.

<sup>14</sup> Voir D.G. ASTIGUETA, « Lettura di vos Estis lux Mundi », dans *Per*, 108 (2019), 519 (= ASTIGUETA, « Lettura di vos Estis lux Mundi »).

<sup>15</sup> François, *Vos estis lux mundi*, art. 1 § 2, c. La victime ici est seulement la personne mineure à l'exclusion de celle vulnérable. Voir ASTIGUETA, « Lettura di vos Estis lux Mundi », 527.



que soit l'instrument employé »<sup>16</sup> sans toutefois définir les expressions « d'images pornographiques de mineurs ». Par contre, l'art. 1 § 1a de *VELM* semble avoir une formulation moins restrictive<sup>17</sup>, apporte plus de précisions et utilise les verbes tels : produire, exhiber, recruter ou inciter, participer. Dès lors la question se pose de savoir si *VELM* dans l'art. 1 § 1a établit de nouveaux délits ? Dans son commentaire, Juan Ignacio Arrieta, Secrétaire du Conseil pontifical pour les textes législatifs, précise que *VELM*, loi pontificale de portée universelle valable pour l'Église latine et pour les Églises orientales *sui iuris*, est un texte de nature procédurale, qui n'identifie pas de nouveaux délits<sup>18</sup>.

En effet, pour d'aucuns, les spécifications de l'art. 1, § 1, a) ne constituent ni une nouvelle loi, ni n'identifient de nouveaux délits ou infractions. Il s'agit plutôt d'explications offertes par le Pape en tant que législateur suprême pour une compréhension correcte et appropriée du terme traditionnel « délit contre le sixième commandement du Décalogue ». Aussi, pour McGrath, il est clair que le Pape ne fait pas une nouvelle loi mais offre une interprétation authentique de ce qui existait déjà conformément au canon 16 § 2<sup>19</sup>. Même si certains des comportements identifiés à l'art. 1 § 1a n'avaient pas été explicitement spécifiés dans la législation antérieure, ils constituent tous des violations graves du sixième commandement tel qu'il est compris dans la jurisprudence ecclésiastique<sup>20</sup>. C'est pourquoi toute personne ayant commis l'une de ces

<sup>16</sup> Voir JEAN-PAUL II, Lettre apostolique *motu proprio*, *Sacramentorum sanctitatis tutela*, 30 avril 2001, dans AAS, 93 (2001), 737-739, traduction française dans DC, 99 (2002), 365 ; CONGRÉGATION POUR LA DOCTRINE DE LA FOI, Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis, 21 mai 2010, dans AAS, 102 (2010), 419-434, traduction française dans DC, 2452 (2010), 760-764.

<sup>17</sup> Voir A. McGRATH, « *Vos Estis Lux Mundi* : A Canonist Reads the Motu Proprio of Pope Francis », dans *CLSGBI Newsletter*, 197 (2020), 7 (= McGRATH, « *Vos Estis Lux Mundi* »); R. RODRIGUEZ-OCANA, « El motu proprio *Vos estis lux mundi* », dans *IC*, 59 (2019), 837-838 (= RODRIGUEZ-OCANA, « El motu proprio »).

<sup>18</sup> Voir J.I. ARRIETA, Motu proprio “vos estis lux mundi”, commentaire, n° 1 : « [...] It is a text that is procedural in nature that does not characterize new offenses [...] ». <http://www.delegumtextibus.va/content/testilegislativi/it/eventi/nota-espliativa-vos-estis-lux-mundidal-mons-juan-igancio-ar.html> (20/12/2020).

<sup>19</sup> CIC/83, canon 16 § 2 : « L'interprétation authentique donnée sous forme de loi a la même force que la loi elle-même et doit être promulguée ; si elle ne fait que déclarer le sens des termes de la loi en eux-mêmes certains, elle a effet rétroactif ; si elle restreint ou étend la portée de la loi, ou si elle explicite une loi douteuse, elle n'a pas d'effet rétroactif ».

<sup>20</sup> De même, une partie de la doctrine soutient que le péché contre le sixième commandement du décalogue suppose une interprétation très large : non seulement le rapport charnel, mais aussi toute attitude explicite par des gestes, paroles et actes qui s'alignent dans la perspective de ce commandement. Voir G. MWANZA PINDI, *Protection de l'enfance contre les délits sexuels dans l'Église*, Paris, Éditions l'Harmattan, 2013, 32 ; A. BORRAS, « Droit canonique,

infractions avant la promulgation et l'entrée en vigueur du *Motu proprio* peut être punie pour celle-ci<sup>21</sup>.

A contrario, d'autres voient en l'art. 1, §1, a) la modification de la loi existante du can. 1395§2 du *CIC/83* et de l'art. 6 des normes sur les délits les plus graves (*SST*). Suivant cette approche, *VELM* déterminerait de nouveaux délits tels les délits d'exhibition, de recrutement et d'incitation de mineur ou de personnes vulnérables à participer à des exhibitions pornographiques<sup>22</sup> ; de même que celui de production de matériel pédopornographique<sup>23</sup>. Sánchez-Giron affirme que le *motu Proprio VELM* dans son art. 1

abus sexuels et délits réservés », dans *Vie consacrée*, 2 (2003), 94 ; J.S. GRABOWSKI, « Clerical Misconduct and Early Traditions regarding the Sixth Commandment », dans *Jur*, 55 (1995), 588 : « [...] the sources and understanding of the Sixth Commandment in the period from the Old Testament to the high Middle Ages were complex and that its use as a catchall for lay and clerical sexual sin was a relatively late development in the tradition » ; J. TUOHEY, « The Correct Interpretation of Canon 1395: The Use of the Sixth Commandment in the Moral Tradition from Trent to the Present Day », dans *Jur*, 55 (1995), 592-631.

<sup>21</sup> Voir MCGRATH, « *Vos Estis Lux Mundi* », 8 : « The specifications found in article 1, §1, a) do not constitute new law, nor do identify new delicts or offense. Rather, they are explanations offered by the Pope as the supreme legislator for the correct and proper of the traditional term "delict against the Sixth Commandment of the Decalogue." Understood in this way, it's clear that the Pope is not making new law but offering an authentic interpretation of what was there already. In accordance with canon 16 §2 [...]. Even though do some of the behaviours identified in article 1, §1, a) had not been specified explicitly in previous legislation, they all amount to serious breaches of the Sixth Commandment as understood in ecclesiastical jurisprudence. For this reason, anyone who committed one of these offenses before the promulgation and coming into force of the *Motu proprio* can be punished for it » ; RODRIGUEZ-OCANA, « El motu proprio », 834-835 : « No coincide exactamente el texto del *VELM* con los delitos que se tipican en el *CIC* (fr. cc. 1395, §2 y 1389, §1) y en la *NGD* (cf. art 6) [...] Pero conviene recordar que no se están tipificando nuevos delitos, sino que se señala el ámbito material de los informes, una vez recibidos, en orden a cómo debe procederse teniendo en cuenta las nuevas normas ».

<sup>22</sup> Voir J.A. RENKEN, « *Vos Estis Lux Mundi*: the Evolution of the Church's Response to Sexual Abuse and Its Cover-up after the Vatican Summit », dans *StC*, 53 (2019), 638-640 : « This provision modifies the existing law (found in the canon 1395, §2 of the Code of Canon Law and article 6 of the *Normae de gravioribus delictis* in several ways [...] the penalties for the newly established delict perpetrated by clerics are not identified » (= RENKEN, « *Vos Estis Lux Mundi* ») ; ASTIGUETA, « *Lettura di vos Estis lux Mundi* », 526, 549. Dans la conclusion de son article, l'auteur présente des conduites délictuelles qu'il estime nouvelles. Tels les actes sexuels avec une personne vulnérable qui n'est pas mineure, ou telle la production de matériel pédopornographique. Même si on peut dire que c'est la formulation qui change la question demeure de savoir s'il ne s'agit pas en réalité de la qualification de nouveaux délits.

<sup>23</sup> Nous estimons ici que l'activité de production doit être distinguée de celle de distribution même si la seconde est très souvent la conséquence logique de la première. Cette distinction peut permettre de déterminer la responsabilité pénale des différents auteurs impliqués. Pour

§ 1a décrit une série de faits qui n'étaient pas des délits canoniques avant son entrée en vigueur. En effet, on peut voir dans ce paragraphe qu'il est fait référence à des faits ou à des comportements qualifiés de « délits ». Cela suffit pour supposer que ceux qui ne l'étaient pas à l'époque le sont devenus en vertu de la *VELM*<sup>24</sup>. *Salvo meliori iudicio*, il nous semble que les faits décrits dans *VELM* laissent paraître de nouveaux délits et non pas seulement une explication des délits préexistants. Quoi qu'il en soit, le canon 1398 § 1, 2°, 3°, fait usage des termes tels que recruter, induire, participer, conserver, acquérir, s'exhiber, divulguer. Il convient, pour les besoins de clarté, de s'attarder sur la description des actes consitutifs de l'élément matériel du délit de pédopornographie. Ces actes sont similaires à ceux énumérés à l'art. 1 § 1a de *VELM*<sup>25</sup>.

Le fait de recruter ou d'induire un mineur ou une personne habituellement affectée d'un usage imparfait de la raison à s'exhiber ou à participer à des exhibitions pornographiques réelles ou simulées, renvoie à l'activité de production de la pornographie infantile. Du latin *prōdūcere*, le verbe produire signifie entre autres le fait de créer, d'engendrer, de faire naître, de provoquer, de donner lieu à, de donner naissance à, d'occasionner. Un élément matériel

Astigueta, bien que *VELM* prévoit—contrairement à *SST*—parmi les actes délictuels le fait de produire ou d'exhiber du matériel pédopornographique, il n'opère pas un changement substantiel. La production ne peut se faire sans acquérir, détenir ou distribuer ce matériel. Voir ASTIGUETA, « Lettura di vos Estis lux Mundi », 526 : « Nell'essenza non cambia niente perché sebbene *VELM* prevede la produzione, a differenza di *SST*, questa non si può fare senza acquisire, tenere o distribuire tale materiale, quindi rimane nelle previsioni e giurisdizione di quest'ultima norma ». Aux termes du n° 7 du *Vademecum* de la CDF, le délit de production de pornographie impliquant des mineurs est puni antérieurement à la date du 21 mai 2010 : « Ces trois délits ne peuvent donc être poursuivis canoniquement qu'à partir de l'entrée en vigueur de *SST*, soit à partir du 21 mai 2010. En revanche, la production de pornographie impliquant des mineurs entre dans la catégorie du délit indiqué aux nn. 1-4 de ce *Vademecum* et doit donc être poursuivie pour des faits antérieurs à cette date, en tenant compte de ce qui est rappelé au n. 3 ». Voir CONGRÉGATION POUR LA DOCTRINE DE LA FOI, *Vademecum* sur quelques points de procédure dans le traitement des cas d'abus sexuel sur mineur commis par des clercs, 16 juillet 2020, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20200716\\_vademecum-casi-abuso\\_fr.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_fr.html), n° 7 (04/01/2021) (= CDF, *Vademecum*).

<sup>24</sup> Voir J.L.R. SÁNCHEZ-GIRON, « *El Motu Proprio vos estis lux mundi*: contenidos y relación con otras normas del derecho canónico vigente », dans *Estudios eclesiásticos*, 94 (2019), 682: « [...] el m.p. en su art. 1, 1a una serie de hechos que no eran delito canónico antes de su entrada en vigor. Sin embargo, se puede ver en dicho párrafo que se refiere por dos veces a todos los hechos de esa letra denominándolos “delitos”. Se diría que con esto debe bastar para asumir que los que no lo eran en ese momento han pasado a serlo en virtud de *VELM* » (= SÁNCHEZ-GIRON, « *El Motu Proprio vos estis* »).

<sup>25</sup> Au moment où nous écrivons cet article, il n'existe pas une/de traduction officielle en langue latine du texte de *VELM*.

objectif du délit visé au canon 1398 et à l'art. 1 § 1a, iii de *VELM* consiste donc à générer ou à représenter, indépendamment du moyen utilisé, un mineur impliqué dans une activité sexuelle explicite, réelle ou simulée ; ou de représenter les organes sexuels de mineurs. Peu importe donc si le matériel pédopornographique utilisé représente celui d'un enfant réel ou s'il est tout simplement le fruit de l'imagination, des rêveries, des abstractions ou des fantasmes de l'auteur. On peut ici se poser la question de savoir si l'activité de production suppose aussi celle de l'écriture ? En d'autres termes, des écrits qui décriraient des activités sexuelles explicites des personnes mineures,<sup>26</sup> mais qui ne comportent pas d'images ou de dessins doivent-ils être compris comme faisant partie des expressions « toute représentation, indépendamment du moyen utilisé » et « quelque moyen que ce soit » employées par le législateur pénal canonique ? L'absence de mention explicite du mot « écrits » avait été critiquée dans les normes révisées de 2010 (Art. § 1, 2° : « l'acquisition [...] d'images pornographiques de mineurs... »). Il nous semble ici qu'en utilisant les termes « matériel pédopornographique » ou « toute représentation », le législateur canonique inclut les écrits.

Le canon 1398 § 1 3° est la codification des trois délits sur des personnes mineures introduits par le motu proprio *SST*, à savoir l'acquisition, la détention et la divulgation d'images pornographiques de mineurs de la part d'un clerc, ne peuvent être poursuivis canoniquement qu'à partir de l'entrée en

<sup>26</sup> Par personne mineure le législateur canonique entend : « Toute personne âgée de moins de dix-huit ans ou équivalente comme telle par la loi ». Voir FRANÇOIS, *Vos estis lux mundi*, art. 1 § 2a. Cette définition du mineur peut varier d'un législateur à l'autre. Au Canada par exemple la définition de personne mineure varie d'une province à l'autre. Dans cinq provinces, une personne mineure est définie comme une personne de moins de 18 ans : Alberta, Manitoba, Ontario, Québec et Île-du-Prince-Édouard. En Saskatchewan, une personne mineure est une personne non mariée de moins de 16 ans. À Terre-Neuve-et-Labrador, une personne mineure est une personne de moins de 16 ans (un adolescent est défini comme une personne âgée de 16 ans ou plus, mais de moins de 18 ans). Dans trois autres provinces et trois territoires, une personne mineure est définie comme une personne de moins de 19 ans : Colombie-Britannique, Nouveau-Brunswick, Nouvelle Écosse, Nunavut, Territoires du Nord-Ouest et Yukon. Voir Immigration, Réfugiés et Citoyenneté Canada, Définition provinciale d'un enfant mineur, <https://www.canada.ca/fr/immigration-refugiescitoyennete/organisation/publications-guides/bulletins-guides-operationnels/demandes-asile/Canada/traitement-définitions-provinciales-enfant-mineur.html> (19-02-2020). Repris par Conférence des Évêques Catholiques du Canada, *Protection des personnes mineures contre les abus sexuels : Appel aux fidèles catholiques du Canada pour la guérison, la réconciliation et la transformation*, Ottawa, CECC, 2018, 92, partie II, §2.4 (= CECC, *Protection des personnes mineures*). Pour le législateur canonique, « l'appellation de mineur n'a pas d'incidence sur la distinction, parfois déduite des sciences psychologiques, entre actes de pédophilie et actes d'éphébophilie, ces derniers concernant des adolescents ayant atteint la puberté. La maturité sexuelle de ceux-là n'affecte pas la définition canonique du délit ». Voir CDF, *Vademecum*, n° 4.

vigueur dudit motu proprio, soit à partir du 21 mai 2010. En revanche, la production de pornographie impliquant des mineurs entre dans la catégorie du délit indiqué aux nn. 1-4 du Vademecum de la CDF et doit être poursuivie pour des faits antérieurs au 21 mai 2010, en tenant compte de l'âge du mineur qui a varié dans le temps<sup>27</sup>. On comprend pourquoi Daly affirme que, bien que la CDF soit compétente pour tous les délits pornographiques commis par des clercs à partir du 1<sup>er</sup> janvier 2020, dans sa pratique, elle a toujours considéré la production de pornographie comme un crime contre la personne. Par conséquent, la CDF a toujours été compétente pour traiter ce crime depuis 2001<sup>28</sup>.

Une des significations du vocable latin *exhibere* renvoie au fait de montrer, de faire voir ou de donner à voir<sup>29</sup>. Dans le cas d'espèce il s'agit de montrer du « matériel pédopornographique » à une personne mineure. Puisque la personne est mineure, il nous semble que la personne adulte ne pourrait valablement alléguer du consentement de celle-ci pour justifier, voire s'exonérer de la commission de ce délit. En d'autres termes, on ne pourrait légitimement affirmer que c'est sur la demande ou avec le consentement du mineur que la personne adulte a exhibé un matériel pédopornographique. Il ne s'agit pas uniquement de l'exhibition à une personne mineure d'un matériel pédopornographique, mais aussi du recrutement et de l'incitation du mineur ou d'une personne vulnérable à participer à des exhibitions pornographiques en général (impliquant même des personnes adultes). Ainsi le recrutement ou incitation des personnes mineures ou vulnérables<sup>30</sup> à participer à de tels actes sont des qualifications pénales nouvelles introduites par *VELM*. Le nouveau canon 1398 utilise plutôt les termes de personne mineure et de « personne habituellement affectée d'un usage imparfait de la raison ou une personne à laquelle le droit reconnaît une protection similaire ».

<sup>27</sup> Voir CDF, Vademecum, n° 6.

<sup>28</sup> B. DALY, « An Analysis of the Vademecum of the Congregation for the Doctrine of the Faith », dans *The Canonist*, 11 (2020), 199.

<sup>29</sup> Dans une récente étude qui explore l'ampleur des abus sexuels commis sur des mineurs par des membres de l'Église catholique en Allemagne, on note que 114 victimes ont été photographiées dans leur nudité. Voir H. DRESSING et al., « Child Sexual Abuse by Catholic Priests, Deacons and Male Members of Religious Orders in the Authority of the German Bishops' Conference: 1946-2014 », dans *Sexual Abuse*, 33 (2021), 283.

<sup>30</sup> La « *personne vulnérable* » est comprise par le législateur canonique comme « toute personne se trouvant dans un état d'infirmité, de déficience physique ou psychique, ou de privation de liberté personnelle qui, de fait, limite, même occasionnellement, sa capacité de compréhension ou de volonté, ou en tout cas de résistance à l'offense ». Voir FRANÇOIS, *Vos estis lux mundi*, art. 1 § 2b. La version révisée du Livre VI du *CIC/83* n'utilise toutefois pas la terminologie de « *personne vulnérable* ».

Le fait de détenir (*dētīnēre*) des « images pédopornographiques » avec l'intention d'y exercer une possession ou leur détention malgré la connaissance qu'elles sont prohibées faisait déjà partie du *reus actus* du délit de l'art. 6 § 1, 2° du *motu proprio Sacramentorum sanctitatis tutela*. En lieu et place du terme images, VELM emploie celui de « matériel pédopornographique » qui est plus englobant. La détention peut se faire par des supports électroniques (informatique) ou papiers<sup>31</sup>. Les faits relatés par Erlandson du scandale publié par les journaux australiens en 2004 du séminariste qui aurait été trouvé en possession d'environ 40 000 photos et vidéos de pornographie infantile et d'un évêque arrêté en 2009 à l'aéroport d'Ottawa après la découverte d'images pornographiques de jeunes garçons dans son ordinateur<sup>32</sup> illustrent bien le caractère répréhensible de telles possessions. En 1984 aux États-Unis, Gilbert Gauthé, un prêtre catholique de Louisiane a été inculpé par un grand jury pour 34 chefs d'accusation parmi lesquels onze chefs d'accusation pour avoir pris des photos pornographiques de personnes mineures<sup>33</sup>. C'est dire que « certains prêtres ont été incarcérés parce qu'ils ont été trouvés en possession de milliers de photos pornographiques montrant des enfants et d'autres mineurs »<sup>34</sup>.

L'acte de distribuer (*distrībūere*) du canon 1398 § 1, 3°) revient à partager, à divulguer des images pédopornographiques indépendamment du moyen utilisé. L'art. 6 § 1, 2° de SST utilisait aussi une formule générique pareille : « de quelque manière que ce soit et quel que soit l'instrument employé » (*quovis modo et quolibet instrumento*). C'est dire que la *mens legislatoris* est d'inclure l'usage du réseau internet sans toutefois exclure les nouvelles technologies qui sont souvent des canaux de divulgation et de commercialisation de tels matériels<sup>35</sup>.

<sup>31</sup> La détention du matériel pédopornographique peut résulter d'une acquisition faite selon les méthodes d'acquisition des biens temporels identifiées par la jurisprudence canonique. Voir M.L. BARTCHAK, « Child Pornography and the Grave Delict of an Offense against the Sixth Commandment of the Decalogue Committed by a Cleric with a Minor », dans *Per*, 100 (2011), 326-333 (= BARTCHAK, « Child Pornography and the Grave Delict »).

<sup>32</sup> Voir G. ERLANDSON et M. BUNSON (dir.), *Pope Benedict XVI and the Sexual Abuse Crisis: Working for Redemption and Renewal*, Indiana, Our Sunday Visitor, 2010, 66-67. L'auteur fait explicitement référence à l'évêque Raymond Lahey.

<sup>33</sup> Voir J. BERRY, *Lead Us Not into Temptation: Catholic Priests and the Sexual Abuse of Children*, Chicago, University of Illinois Press, 2000, 50.

<sup>34</sup> C. SCICLUNA, « Procédure et praxis de la Congrégation pour la doctrine de la foi en matière de *graviora delicta* », dans DUGAN (dir.), *La procédure pénale et la protection des droits*, 297 (= SCICLUNA, « Procédure et praxis de la Congrégation »).

<sup>35</sup> Voir PAPALE, « I delitti contro la morale », 57; BARTCHAK, « Child Pornography and the Grave Delict », 329-333; R.P. TYLER et L.E. STONE, « Child Pornography: Perpetuating the Sexual Abuse of Children », dans *Child Abuse & Neglect*, 9 (1985), 316 (= TYLER et STONE, « Child Pornography »).

Puisque l'ingéniosité criminelle en matière d'abus envers les personnes mineures, celles habituellement affectées d'un usage imparfait de la raison ou celles à qui le droit reconnaît une protection similaire, prend de plus en plus de nouvelles formes—telle la « sextorsion » qui consiste en l'extorsion via internet (webcam) de faveurs sexuelles ou monétaires—le législateur canonique incrimine aussi le fait de recruter ou d'inciter des personnes mineures à participer à des exhibitions pornographiques. Le recrutement et l'incitation peuvent se faire à travers diverses tactiques : le « grooming », le chantage, la flatterie, la séduction (c. 1398 § 1, 2°). Le chantage pourrait être assimilé à la menace évoquée au canon 1395 § 3. Avec la Pandémie du Covid.19, on comprend aisément aujourd'hui que ce recrutement et cette incitation peuvent se faire virtuellement et non pas seulement physiquement.

L'âge du mineur, sujet passif du canon 1398 et de l'art. 1 § 1a, iii de *VELM* fait partie des éléments matériels du délit de pédopornographie. Puisque nous sommes en matière pénale, le principe de l'interprétation stricte des canons 18 *CIC/83* et 1500 *CCEO* veut que le délit en question ne soit réalisé que si la production, l'exhibition, la détention, la distribution ainsi que le recrutement ou incitation à participer à des exhibitions pornographiques impliquent uniquement les personnes mineures de moins de dix-huit ans, celles équiparées par la loi<sup>36</sup> ou celles qui sont habituellement affectées d'un usage imparfait de la raison ou celles à qui le droit reconnaît une protection similaire (c. 1398 § 1, 1°, 2°, 3°). L'âge du mineur de dix-huit ans pour ce type de délit est un changement car l'art 6 § 1, 2 des normes rénovées *Sacramentorum sanctitatis tutela* de 2010 fixait l'âge du mineur à moins de quatorze ans<sup>37</sup>.

## 1.2 — L'élément subjectif ou intentionnel du délit

Pour ce qui est de l'élément subjectif, le délit le plus grave de pédopornographie requiert un dol spécial. En d'autres termes, il n'est pas suffisant qu'un clerc, un membre d'Institut de vie consacrée ou celui appartenant à une Société de vie apostolique ait agi en toute conscience et liberté. Il faut qu'il ait agi, aux termes de l'art. 1 § 1c de *VELM*, à « des fins principalement

<sup>36</sup> Voir FRANÇOIS, *Vos estis lux mundi*, art. 1 § 2a.

<sup>37</sup> Voir BARTCHAK, « Child Pornography and the Grave Delict », 318-319; G.D. VARUVEL, « Il delitto di pornografia minorile da parte di un chierico », dans *Ap*, 87 (2014), 168 (= VARUVEL, « Il delitto di pornografia minorile »). Voir aussi CDF, Rescrit *ex audientia Sanctissimi*, 03 Décembre 2019, <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217a.html>. Le Rescrit *ex audientia Sanctissimi* effectue le changement de l'âge du mineur de moins de 14 ans à celui de moins de 18 ans. L'art. 6, 1° de la version révisée de *SST* du 07 Décembre 2021 intègre l'âge du mineur de moins de 18 ans.



sexuelles ». Selon le canon 1398 § 1, 3°, ces images pédopornographiques doivent être acquises de « façon immorale » (« *contra bonos mores* »). L'art. 6 § 1, 2° de la SST emploie l'expression « à une fin libidineuse » (*turpe patrata*)<sup>38</sup>. Cette incise du législateur exclut la faute (c. 1321 § 2) comme une des sources d'imputabilité (c. 1321 § 1) car une action délibérée de la part de l'auteur du délit est nécessaire<sup>39</sup>. On comprend pourquoi Astigueta affirme que le sens de l'adverbe « des fins principalement sexuelles » de *VELM* est d'éviter que la possession et la conservation d'images pédopornographiques dans des causes pénales ne soient considérés comme un délit<sup>40</sup>. Aussi, le simple acte de télécharger inconsciemment des images pédopornographiques ou de se rendre compte seulement à la fin de son téléchargement que certaines images non désirées s'y sont infiltrées n'implique pas automatiquement la responsabilité pénale, il faut encore qu'il y ait l'élément subjectif qui est la fin libidineuse<sup>41</sup> ou alors principalement sexuelle. Cette dernière vise la gratification sexuelle et n'a généralement pas un but honnête ou moral.

Aussi l'élément intentionnel manque dans l'acceptation sans paiement de la pornographie infantile alors qu'on ne l'a pas sollicité. Ceci peut advenir lors d'une recherche (*browsing*)<sup>42</sup> sur internet ou alors lorsque naviguant sur un site pornographique « adulte », on est subitement dirigé vers un site pédopornographique<sup>43</sup>. Toutefois, le délit est réalisé si la personne poursuit la navigation sur ledit site et télécharge (*downloads*) lesdites images<sup>44</sup>. C'est aussi le cas lorsque le clerc accepte des dons de photos, de magazines ou vidéos pédopornographiques sans s'en débarrasser lorsqu'il s'en aperçoit. Aussi dans un cas X soumis à la CDF, il fut noté que la découverte des traces

<sup>38</sup> Voir RENKEN, « *Normae de gravioribus delictis* », 81.

<sup>39</sup> Voir C. PAPALE, « I delitti contro la morale », dans ASSOCIAZIONE CANONISTICA ITALIANA (dir.), *Questioni attuali di diritto*, 64 (= PAPALE, « I delitti contro la morale ») ; BARTCHAK, « Child Pornography and the Grave Delict », 347-348.

<sup>40</sup> Voir ASTIGUETA, « Lettura di vos Estis lux Mundi », 526-527 : « Il senso dell'avverbio "prevalentemente" è per evitare che la possessione e conservazione delle immagini pedopornografiche nelle cause penali posso essere considerati in questo delitto ».

<sup>41</sup> Voir *ibid.*, « I delitti contro la morale », 59-60 ; VARUVEL, « Il delitto di pornografia minore », 169.

<sup>42</sup> À la lumière de l'art. 6 § 1, 2°, le simple fait de visionner les images pédopornographiques ne constitue pas une conduite pénalement sanctionnée car l'auteur ne procède ni à l'acquisition, ni à la détention ou à la divulgation du matériel pédopornographique. La simple consultation de telles images via web n'est donc sanctionnée que sur le plan moral. Voir PAPALE, « I delitti contro la morale », 64.

<sup>43</sup> Voir BARTCHAK, « Child Pornography and the Grave Delict », 328.

<sup>44</sup> Voir SCICLUNA, « Sexual Abuse of Children », 19 : « The recent praxis of the Congregation has established that the downloading, as opposed to the simple browsing, of a paedophile pornography from the internet falls under the *delictum graves* ».



de consultation d'images pédopornographiques dans le « hard disk » de l'accusé constituait une preuve de la consultation par l'utilisateur, mais pas une preuve de la détention consciente et volontaire de celles-ci, puisque lesdits fichiers avaient été générés automatiquement en dehors du contrôle de l'utilisateur ; c'est-à-dire en dehors d'un téléchargement et d'un stockage de manière consciente et volontaire de ce matériel<sup>45</sup>.

Mais comment prouver la *mens rea* ou la grave intention dolosive ? S'il paraît parfois aisé de déceler cette intention chez le sujet qui recrute, incite des mineurs ou des personnes vulnérables à des exhibitions pornographiques ou même chez l'individu qui produit, exhibe et distribue du matériel pédopornographique, il est moins aisé de prouver cette intention chez la personne qui possède tout simplement de telles images. Comment faire dans ce cas ? L'intention criminelle du détenteur des images pédopornographiques par exemple peut être prouvée par la manière dont les fichiers sont rangés dans l'ordinateur, portant des noms qui cachent la réalité du contenu ou décrivant les tranches d'âges des enfants. Ces fichiers sont souvent bien dissimulés. L'auteur utilise généralement les pseudonymes et dispose d'une pluralité de courriels<sup>46</sup>. On sait aussi que les pédopornographes détruisent rarement, voire jamais, leurs collections de pornographie infantile, même lorsqu'ils sont menacés de découverte et d'arrestation. Le matériel en leur possession est pour eux si précieux pour l'accomplissement de leur mode de vie qu'ils préfèrent risquer de graves conséquences plutôt que de détruire totalement leur collection<sup>47</sup>.

Une recherche de preuves ainsi envisagée requiert des compétences spécialisées en informatique et cybercriminalité que l'Ordinaire ou le supérieur religieux pourrait ne pas avoir à sa disposition. Raison pour laquelle les enquêtes préliminaires sur les cas de pédopornographie doivent, selon Scicluna, inclure les autorités civiles qui ont le matériel et la compétence nécessaires. D'ailleurs, de manière générale, dans beaucoup de juridictions civiles, il est illégal pour le diocèse de conduire de telles investigations<sup>48</sup>.

<sup>45</sup> Voir C. PAPALE, *Delicta reservata: 103 casi giuridici*, Rome, Urbaniana University Press, 122 (= PAPALE, *Delicta reservata*).

<sup>46</sup> Voir M.M. FERRARO et al. (dir.), *Investigating Child Exploitation and Pornography: The Internet, the Law and Forensic Science*, Amsterdam/Boston, Elsevier/Academic Press, 2005, 246-247; BARTCHAK, « Child Pornography and the Grave Delict », 349-251.

<sup>47</sup> Voir TYLER et STONE, « Child Pornography », 317.

<sup>48</sup> Voir CANON LAW SOCIETY OF AMERICA, Notes of Meeting with C. Scicluna: Processing Cases of *Graviora Delicta*, 2 mars 2010, <http://c.ymcdn.com/sites/www.clsa.org/resource/resmgr/newsletters/1006newsletter2.pdf?hhSearchTerms=%22scicluna%22> (25 juin 2017), 7: « Mandates of civil agencies must be strictly enforced in cases involving pornography. In many jurisdictions it is illegal for the diocese to conduct any investigation which involves

Exceptionnellement, la possession des images pédopornographiques est considérée comme étant de bonne foi pour des raisons médicales, scientifiques, éducationnelles, gouvernementales et autres buts similaires. Et même dans ce cas, une permission des autorités civiles est requise dans certaines juridictions. Pour les enquêtes préliminaires prévues aux canons 1717 § 1, 1718 § 1 *CIC*/ 83 et 1468 § 1, 1469 § 1 *CCEO*, bien que l'art. 16 des normes *SST* révisées en 2010 ne mentionne pas qu'il faille demander une permission, on présume que, pour les enquêtes préliminaires, un clerc désigné pour cette tâche peut récupérer ces images et les donner à l'évêque ou l'autorité civile sans qu'il y ait délit de distribution ou de divulgation<sup>49</sup>.

### 1.3 — La répression de la pornographie juvénile en droit canonique

La répression effective du délit de pédopornographie par le législateur canonique suppose la détermination préalable de la nature de la sanction. Par ailleurs, cette répression ne peut éluder l'effet de l'écoulement du temps.

#### 1.3.1 — La nature de la sanction canonique prévue

Dans la législation canonique actuelle, le délit de pédopornographie du mineur de moins de 18 ans fait partie, depuis le 01 janvier 2020, des délits les plus graves contre les mœurs réservées à la Congrégation pour la Doctrine de la Foi si commis par un clerc<sup>50</sup>. Le problème auparavant soulevé par

accessing the pornography » (= CLSA, Notes of Meeting). Voir aussi RENKEN, « *Normae de gravioribus delictis* », 81; BARTCHAK, « Child Pornography and the Grave Delict », 354, 360-361.

<sup>49</sup> Voir BARTCHAK, « Child Pornography and the Grave Delict », 306-307.

<sup>50</sup> Voir CDF, Le Rescrit *ex audientia Sanctissimi* du 03 Décembre 2019. Art. 1. Avant le changement de l'âge du mineur de 14 ans à celui de 18 ans de l'art. 6 § 1, 2° de la *Sacramentorum sanctitatis* (version rénovée de 2010), seuls les cas de pornographie infantile de moins de quatorze ans étaient des délits réservés à la CDF et non ceux des enfants de quatorze ans à moins de dix-huit ans. Si dans un même cas on était en présence d'images pornographiques de mineurs de quatorze ans et de celui de plus de quatorze ans, alors, en vertu du lien de connexité de l'art. 8 § 2 des normes révisées, la CDF jugerait l'entière responsabilité du cas car, même dans le cas du mineur de moins de dix-huit ans, il y aurait violation du canon 1395 § 2. Voir aussi SCICLUNA, « Procédure et praxis de la Congrégation », 297 ; P.L. SABARESE et al. (dir.), « Abusi sessuali compiuti da religiosi chierici o fratelli nei confronti di minori: l'intervento del Superiore maggiore: orientamenti, norme canoniche e civili », dans ASSOCIAZIONE CANONISTICA ITALIANA (dir.), *Questioni attuali di diritto penale canonico*, Studi giuridici 96, Cité du Vatican, LEV, 2012, 259; F.G. MORRISEY, « Selected Canonical and Civil Issues Facing Religious Institutes Today », dans *Studies in Church Law*, 9 (2013), 121; CDF, *Vademecum*, n° 6.

une partie de la Doctrine par rapport au fait que le choix de l'âge du mineur de moins de quatorze conduisait à la négligence des cas de pédopornographie de personnes âgées de quatorze ans à moins de dix-huit ans est ainsi résolu<sup>51</sup>. Le canon 1398 § 1, 1° inflige au clerc la peine expiatoire de la privation de l'office et d'autres justes peines, y compris, selon le cas, le renvoi de l'état clérical. Ce renvoi de l'état clérical était déjà prévu par l'article 6 § 2 de la version révisée de SST 2010, « le clerc qui accomplit les délits dont il s'agit au § 1 sera puni selon la gravité du crime, sans exclure le renvoi ou la déposition ». Le renvoi ou la déposition est donc une des sanctions possibles applicables aux clercs coupables de tels délits. L'art. 6 des normes SST révisées en 2021 ne mentionne plus ce § 2 ; la sanction réservée à ces clercs étant déjà prévue par le nouveau canon 1398 § 2, 1°.

Avant la publication de la version révisée du livre VI du CIC/83, la question de la clarification de la peine pour les membres d'Instituts de vie consacrée ou de Sociétés de vie apostolique se posait. Si aux termes du *motu proprio VELM*, ils sont désormais les auteurs possibles du délit ecclésiastique<sup>52</sup> de pédopornographie, alors la sanction serait-elle celle prévue aux canon 695 § 1<sup>53</sup>, le canon 729 (pour les membres des instituts séculiers) et canon 746 qui renvoie aux canons 694 à 704 (pour les membres des sociétés de vie apostolique)? S'il est vrai qu'on ne doutait pas qu'une sanction fut nécessaire dans ces cas<sup>54</sup>, on aurait toutefois souhaité qu'elle fût déterminée par le législateur pénal canonique<sup>55</sup>. Par ailleurs, le *Vademecum* de la CDF, qui n'est pas un texte législatif, affirme le renvoi du religieux de l'institut religieux (cf. cc. 695 ss. CIC). Cependant, dans ce cas, le renvoi n'est pas une peine, mais un acte administratif du modérateur suprême.

<sup>51</sup> Voir VARUVEL, « Il delitto di pornografia minorile », 168.

<sup>52</sup> Astigueta souligne fort à propos le changement majeur effectué par *VELM* par rapport à la doctrine précédente. Alors qu'auparavant, les religieux non-cléricaux qui commettaient les crimes prévus au canon 1395 § 2 ne faisaient pas l'objet d'une sanction pénale, mais plutôt être renvoyés, ils sont maintenant, y compris les membres du SVA, pleinement impliqués pénalement. Voir ASTIGUETA, « Lettura di vos Estis lux Mundi », 519 : « Mentre prima, i religiosi non chierici che commettevano i delitti previsti nel can. 1395, § 2 non erano oggetto d'una sanzione penale, sì della dimissione, adesso sono pienamente coinvolti penalmente, e questo includendo i membre delle SVA ». Bien évidemment les auteurs identifiés à l'art. 6 de *VELM* sont aussi les sujets de l'art. 1 dudit *motu proprio*.

<sup>53</sup> Voir CIC/83, c. 695 § 1 : « Un membre doit être renvoyé pour les délits dont il s'agit aux cann. 1397, 1398 et 1395, à moins que pour les délits dont il s'agit au can. 1395 § 2, le Supérieur n'estime que le renvoi n'est pas absolument nécessaire et qu'il y a moyen de pourvoir autrement et suffisamment à l'amendement du membre ainsi qu'au rétablissement de la justice et à la réparation du scandale ».

<sup>54</sup> Voir SÁNCHEZ-GIRON, « El *Motu Proprio vos estis* », 681.

<sup>55</sup> Voir RENKEN, « *Vos Estis Lux Mundi* », 640.

Cette quête légitime de clarification de la peine trouve sa réponse au nouveau canon 1398 § 2 : « Le membre d'un institut de vie consacrée ou d'une société de vie apostolique, et n'importe quel fidèle qui jouit d'une dignité ou accomplit un office ou une fonction dans l'Église, s'il commet le délit dont il est question au § 1, ou au can. 1395, § 3, sera puni selon le can. 1336, §§ 2-4, avec l'ajout d'autres peines suivant la gravité du délit ». C'est dire que désormais, si ces personnes sont reconnues coupables des délits de pédopornographie ou d'autres délits sexuels commis avec violence, menaces ou par abus d'autorité, elles seront punies de l'une ou/et l'autre des peines expiatoires prévues au canon 1336, §§ 2-4.

Il n'est pas inutile de souligner que le *Vademecum* de la CDF ne concerne que les délits d'abus sexuels cléricaux sur des mineurs car seuls ces délits sont réservés au CDF. Par conséquent, ce texte ne traite pas du délit d'abus sexuel de mineurs commis par des membres d'Instituts de vie consacrée et de Sociétés de vie apostolique<sup>56</sup>, ou de l'abus sexuel de personnes « vulnérables » commis par des clercs et des religieux<sup>57</sup>. Ces délits sont définis par *VELM*, mais ils ne sont pas des *delicta graviora* réservés à la CDF. Autrement dit, les délits réservés à la CDF sont les abus commis par des clercs, ils ne concernent donc pas les membres (hommes ou femmes) des Instituts de vie consacrée ou de Sociétés de vie apostolique<sup>58</sup>. Pour de tels délits ces derniers doivent donc être dénoncés à la Congrégation pour les instituts de

<sup>56</sup> Voir CDF, *Vademecum*, n° 8 : « Selon le droit des religieux de l'Église latine, le délit mentionné au n. 1 peut également entraîner le renvoi de l'institut religieux (cf. cann. 695 ss. CIC). Il faut dès lors noter ce qui suit : a) un tel renvoi n'est pas une peine, mais un acte administratif du modérateur suprême ; b) pour qu'il soit décrété, la procédure décrite aux cann. 695 § 2, 699 et 700 CIC doit être scrupuleusement observée ; c) la confirmation du décret de renvoi prévue par le can. 700 CIC doit être demandée à la CDF ; d) le renvoi de l'institut entraîne la perte de l'incorporation à l'institut ainsi que la cessation des vœux et obligations découlant de la profession (cf. can. 701 CIC), mais aussi l'interdiction d'exercer l'Ordre reçu jusqu'à ce que soient vérifiées les conditions mentionnées dans le can. 701 CIC. Les mêmes règles, moyennant les adaptations appropriées, s'appliquent également aux membres définitivement incorporés dans les sociétés de vie apostolique (cf. can. 746 CIC) ».

<sup>57</sup> Voir CDF, *Vademecum*, n° 5 : « La révision du motu proprio SST, promulguée le 21 mai 2010, a établi qu'est équiparée au mineur la personne qui jouit habituellement d'un usage imparfait de la raison (cf. art. 6 § 1, 1° SST). L'expression personne vulnérable, définie comme « personne se trouvant dans un état d'infirmité, de déficience physique ou psychique, ou de privation de liberté personnelle qui, de fait, limite, même occasionnellement, sa capacité de compréhension ou de volonté, ou en tout cas de résistance à l'offense » (art. 1 § 2, b *VELM*), intègre des cas d'espèce débordant la compétence de la CDF, qui reste limitée, outre le mineur de moins de dix-huit ans, à la personne qui « jouit habituellement d'un usage imparfait de la raison ». Les autres cas d'espèce en dehors de ceux-ci sont traités par les Dicastères compétents (cf. art. 7 § 1 *VELM*) ».

<sup>58</sup> Voir RODRIGUEZ-OCANA, « El motu proprio », 842-843.

vie consacrée et des sociétés de vie apostolique s'ils sont de droit pontifical ou à l'Évêque compétent s'ils sont de droit diocésain.

Au-delà de l'aspect délictuel, les délits du c. 1398 §2, des art. 1 §1a, iii et §2c de *VELM* sont à considérer comme une offense contre la chasteté car ils violent les canons 277 §§1-2 *CIC* et 374 *CCEO* qui font obligation aux clercs de vivre « la continence parfaite et perpétuelle à cause du Royaume des cieux ». Ils sont incompatibles avec la vie consacrée. Aussi le droit particulier des instituts de vie consacrée et des sociétés de vie apostolique, dans leurs constitutions ou normes particulières devraient explicitement traiter de tels actes et envisager les conséquences qu'ils entraînent pour le membre jugé coupable.

Dans la *praxis* de la CDF, le renvoi de l'état clérical n'était généralement pas imposé comme sanction *ex officio* dans les cas de pornographie<sup>59</sup>. Cette option de la CDF se poursuivra-t-elle dans les cas de pédopornographie après la publication de *VELM*<sup>60</sup> ? Des questions résultant d'une certaine *lacuna iuris* peuvent légitimement être posées : les « nouveaux actes délictuels » décrits par *VELM*, tels la production, l'exhibition, le recrutement ou l'incitation des personnes mineures ou vulnérables par des clercs sont-ils réservés à la CDF ? Si oui, il conviendrait que le législateur pénal canonique l'affirme explicitement. En outre, quelle est leur période de prescription criminelle ?<sup>61</sup>

### 1.3.2 — Le temps de prescription du délit

Le *motu proprio VELM* ne traite malheureusement pas expressément des délais de prescription criminelle et particulièrement de ceux du délit de pédopornographie. Avant la publication de la version révisée du livre VI du *CIC/83*, Astigueta pris en compte les divers actes de nature criminelle décrits par ledit *motu proprio* et en déduisit les délais de la prescription criminelle. Aussi en ce qui concerne les délits contre le sixième commandement qui rentrent dans

<sup>59</sup> Voir CLSA, Notes of Meeting, 12: « Dismissal from the clerical state is generally not imposed as an *ex officio* penalty for cases involving only the use of pornography »; RENKEN, « *Normae de gravioribus delictis* », 81; BARTCHAK, « Child Pornography and the Grave Delict », 370. Pour les instructions données par la CDF dans le traitement de certains cas de détention d'images pédopornographiques, voir PAPALE, *Delicta reservata*, 115-123 (les cas 97 à 103). On note au cas 99 que l'Accusé reconnu avoir commis le délit de pédopornographie et avoir sollicité la grâce de la dispense des obligations liées à la vie sacerdotale ainsi que celles liées au célibat. Il reçut du Pape une réponse favorable : « Cum voto favorabili pro bono Ecclesiae ».

<sup>60</sup> Pour un étude synchronique et diachronique de la *praxis* de la CDF, voir J.B Farnos, « La *praxis* de la Congregación para la Doctrina de la Fe, expression de un 'cambio de mentalidad' », dans *IC*, 60 (2020), 31-61.

<sup>61</sup> Voir RENKEN, « *Vos Estis Lux Mundi* », 640-641.

les cas prévus par la SST (avec un mineur de 18 ans, avec un mineur à qui manque habituellement l'usage de la raison et la possession, l'acquisition et la divulgation de matériel pédopornographique avec un mineur de 14 ans, le recrutement et l'incitation à des exhibitions pornographiques), le délai est de 20 ans à partir du moment où le mineur a atteint l'âge de la majorité. Seulement pour ces délits est prévue la « dispense » de prescription.

Prenant toujours en compte l'« ancienne » version du livre VI, Astigueta affirmait que, pour ce qui est des délits contre le sixième commandement commis avec des adultes, avec violence et menaces, la durée était de cinq ans (voir ancien c. 1362 § 1, 2<sup>o</sup>). Pour les délits contre le sixième commandement commis avec des adultes ou personnes vulnérables ainsi que des « actions ou omissions directes visant à interférer ou éluder les enquêtes civiles ou des enquêtes canoniques », la norme générale du canon 1362 § 1 de trois ans s'applique. Il en va de même pour les violations du sixième commandement par les membres laïcs des instituts religieux et des SVC<sup>62</sup>. Dès le 8 décembre 2021, date d'entrée en vigueur de la version révisée du livre VI, l'action criminelle du délit de pédopornographie des canons 1398 § 2, et 1395 § 3 commis par un membre d'un institut de vie consacrée ou d'une société de vie apostolique ou n'importe quel fidèle qui jouit d'une dignité ou accomplit un office ou une fonction dans l'Église, sera prescrite au bout de sept ans. Par contre celle du délit de pornographie infantile visé au canon 1398 § 1 commis par un clerc sera prescrite au bout de vingt ans (c. 1362 § 1, 2<sup>o</sup>). L'infraction de pédopornographie est réprimée par plusieurs législations étatiques<sup>63</sup>. Comment le droit criminel canadien règlemente-t-il cette infraction ?

## 2 — La pédopornographie en droit criminel canadien

La pornographie juvénile est définie à l'art. 163.1 (1) du Code criminel du Canada<sup>64</sup>. Cette dernière inclut la « production » ou la « distribution ».

- a) de toute représentation photographique, filmée, vidéo ou autre, réalisée ou non par des moyens mécaniques ou électroniques

<sup>62</sup> Voir ASTIGUETA, « Lettura di vos Estis lux Mundi », 531-532.

<sup>63</sup> Voir J. BERNAL, « Cuestiones canónicas sobre los delitos más graves contra el sexto mandamiento del decalogo », dans *IC*, 54 (2014), 178; T.J. GREEN, « *Sacramentorum Sanctitatis Tutela*: Reflections on the Revised May 2010 Norms on More Serious Delicts », dans *Jur*, 71 (2011), 139; BARTCHAK, « Child Pornography and the Grave Delict », 338-341.

<sup>64</sup> En droit canadien, une distinction est faite entre le droit pénal qui est provincial et le droit criminel qui est fédéral. Voir art. 91 (27) Loi constitutionnelle de 1867 (R.-U.), 30 et 31 Vict., c. 3; L.R.C. 1985, app. II n<sup>o</sup>V, « [i]l sera loisible à la Reine, de l'avis et du consen-

- (i) soit où figure une personne âgée de moins de dix-huit ans ou présentée comme telle et se livrant ou présentée comme se livrant à une activité sexuelle explicite,
- (ii) soit dont la caractéristique dominante est la représentation, dans un but sexuel, d'organes sexuels ou de la région anale d'une personne âgée de moins de dix-huit ans ;
- b) de tout écrit, de toute représentation ou de tout enregistrement sonore qui préconise ou conseille une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi ;
- c) de tout écrit dont la caractéristique dominante est la description, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi ;
- d) de tout enregistrement sonore dont la caractéristique dominante est la description, la présentation ou la simulation, dans un but sexuel, d'une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi<sup>65</sup>.

tement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces ; (...), il est par la présente déclaré que (...) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés : (...) 27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle ». Par contre, selon l'article 92 (15) de la même loi, « Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, à savoir : (...) 15. L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières tombant dans aucune des catégories de sujets énumérés dans le présent article ». Voir aussi G. CÔTE-HAPPER, P. RAINVILLE et J.-TURGEON (dir.), *Traité de droit pénal canadien*, Cowansville, Éd. Yvon Blais, 1998, 9. Cité par VALLET, La protection des mineurs, 13-14.

<sup>65</sup> Voir Lois Refondues du Canada depuis 1985 (L.R.C. 1985), ch. C46, art. 163.1) : <https://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-c-46/168558/lrc-1985-c-c-46.html?searchUrl=AAAAAQAgTC5SLkMuIDE5ODUsIGNoLiBDNDYsIGFydC4gMTYzLjEAAAAAAQ&offset=0>. Le Centre canadien de protection de l'enfance (CCPE) dans un rapport de 2020 montre que des millions d'images d'abus pédosexuels circulent librement sur Internet chaque jour à travers des sombres recoins du Web clandestin et sur certaines des plateformes Web les plus connues. La plupart des plateformes Web ne disposent pas de mécanismes spécifiques pour signaler des images d'abus pédosexuels. Le CCPE recommande cinq mesures importantes qui permettraient aux entreprises de technologie de réduire immédiatement les préjudices causés aux enfants et aux survivantes et survivants : créer des catégories de signalement spécifiques aux images d'abus pédosexuels ; offrir des options de

Il convient pour cette infraction de distinguer l'élément matériel ou l'« *actus reus* » de l'élément intentionnel ou « *mens rea* ».

### **2.1 — L'élément matériel : posséder ou détenir du matériel pédopornographique**

De manière générale, les dispositions du droit canadien qui réfèrent à la pornographie juvénile peuvent être regroupées sous les vocables de « production » et de « distribution » de pédopornographie. Les articles 163.1 (2) et (3) du Code criminel canadien énoncent que « quiconque produit, imprime ou publie, ou a en sa possession en vue de la publication, de la pornographie juvénile est coupable »; ainsi que « quiconque transmet, rend accessible, distribue, vend, importe ou exporte de la pornographie juvénile ou en fait la publicité, ou en a en sa possession en vue de la transmettre, de la rendre accessible, de la distribuer, de la vendre, de l'exporter ou de la rendre accessible, de la distribuer, de la vendre, de l'exporter ou d'en faire la publicité ».

Aussi, le législateur canadien incrimine-t-il les gestes préparatoires à la commission d'infractions à caractère sexuel à l'encontre de personnes mineures (tels racoler, harceler, faire du chantage par le biais d'un réseau de communication, dans le but d'obtenir des faveurs sexuelles). On parle alors de l'infraction du leurre visé à l'art. 172.1 (1) au Code criminel :

Commet une infraction quiconque communique par un moyen de télécommunication avec :

- a) une personne âgée de moins de dix-huit ans ou qu'il croit telle, en vue de faciliter la perpétration à son égard d'une infraction visée au paragraphe 153(1), aux articles 155, 163.1, 170, 171 ou 279.011 ou aux paragraphes 279.02(2), 279.03(2), 286.1(2), 286.2(2) ou 286.3(2).

L'infraction de pédopornographie peut donc se scinder en deux : la pédopornographie réelle (les personnes mineures de moins de dix-huit ans qui existent effectivement, c'est-à-dire sont exploitées sexuellement et mises en ligne sur Internet) et la pédopornographie virtuelle (dans ce cas, la personne

signalement spécifiques aux images d'abus pédosexuels dans des menus faciles à trouver ; uniformiser les mécanismes de signalement au sein d'une même plateforme ; offrir la possibilité de signaler des images visibles sans avoir à créer un compte ou à se connecter à un compte ; éliminer les champs obligatoires destinés à la collecte de renseignements personnels sur les formulaires de signalement. Voir CCPE, Analyse de mécanismes de signalement d'images d'abus pédosexuels sur les plateformes grand public, Centre canadien de protection de l'enfance inc, 2020, 25; <https://protegeonsnosenfants.ca/fr/zone-medias/communiques/2020/csam-reporting-web-platforms-review> (09/04/2021).



mineure n'existe pas réellement, elle est artificielle/virtuelle et totalement créée de manière imaginaire)<sup>66</sup>.

La pédopornographie réelle se subdivise en deux types : la pédopornographie active qui met en scène un mineur réel afin de produire du matériel à caractère sexuel et celle passive. La pédopornographie réelle active requiert pour sa réalisation, la présence des personnes mineures réelles et profite de leur vulnérabilité. La pédopornographie est ainsi créée par la personne elle-même dans le but ultime de la diffuser. La pédopornographie réelle active concerne plus particulièrement les personnes qui produisent et diffusent ce matériel. Par contre la pédopornographie passive, ne réfère qu'aux personnes qui consomment du matériel pédopornographique et peuvent décider de le transmettre ou d'en faire le trafic sans passer à l'acte. Ces individus sont généralement dits passifs puisqu'ils n'exploitent pas sexuellement la personne réelle mineure, mais seulement son image. Il s'agit en effet de l'incrimination du simple consommateur par le législateur canadien. D'où l'infraction de possession ou de détention de la pédopornographie<sup>67</sup>.

Quant à la pédopornographie virtuelle, elle est celle où la personne mineure est irréelle. Il s'agit en effet de la représentation fictive d'une personne dont l'apparence est celle d'un moins de dix-huit ans en raison de ses caractéristiques physiques. La pédopornographie virtuelle n'utilise donc aucun mineur « en chair et en os »<sup>68</sup>. Elle est entièrement créée par l'imagination et le fantasme d'un individu au moyen d'un procédé mécanique, informatique ou électronique. Les dessins et les illustrations, contenus sur n'importe quel support, sont considérés comme de la pédopornographie virtuelle<sup>69</sup>. Cette dernière, parce qu'elle ne contient pas de personnes réelles a été qualifiée par certains de « pseudo-pédopornographie » ou de « pédopornographie apparente ». Du fait que la pédopornographie virtuelle est immatérielle ou fictive, le processus de sa répression a été controversé.<sup>70</sup> Au niveau pratique, il faut reconnaître que la distinction entre des images pornographiques réelles et images pornographiques artificielles d'enfants n'est pas chose aisée. La Cour suprême du Canada réprime la pédopornographie virtuelle car

<sup>66</sup> Voir VALLET, La protection des mineurs, 217-219.

<sup>67</sup> Voir *ibid.*, 244-249.

<sup>68</sup> Pour une tentative de saisie des enjeux qui sous-tendent la pédopornographie en ligne et le fonctionnement des sujets « téléchargeurs », voir X. VLACHOPOULOU et S. MISSONNIER (dir.), « Le passage à l'acte pédophile et les enjeux psychopathologiques du téléchargement : un virtuel protecteur », dans *Annales médico psychologiques*, 176 (2018), 301-304.

<sup>69</sup> Voir VALLET, La protection des mineurs, 265.

<sup>70</sup> Voir E. WERY, *Sexe en ligne : aspects juridiques et protection des mineurs*, Bruxelles, Larcier, 2004, 67.

la personne mineure subit un certain dommage par la diffusion ou la production d'images pornographiques créées par le biais de l'imagination. La pédopornographie virtuelle cause un risque de préjudice aux enfants.<sup>71</sup>

## 2.2 — L'élément moral : les critères de consentement, de contrôle et de connaissance

L'existence de l'élément intentionnel demeure nécessaire à la réalisation de l'infraction de possession ou de détention de la pédopornographie. Autrement dit, il faut qu'il y ait la conscience et la volonté de détenir ou de posséder un tel matériel, peu importe son origine<sup>72</sup>. Pour déceler l'élément moral, la jurisprudence canadienne a recouru à la théorie des trois C à savoir : connaissance, consentement et contrôle : « l'intention subjective de possession de matériel prohibé comporte que l'accusé a la connaissance du contenu du matériel détenu, qu'il exerce à son égard un certain contrôle et qu'il le fait avec consentement »<sup>73</sup>. Ainsi le fait qu'une personne, en connaissance de cause et hors de tout doute raisonnable, volontairement commande, enregistre, conserve, télécharge<sup>74</sup>, manipule des images et les classe dans un fichier électronique constitue les preuves de cette intention<sup>75</sup>. Toutefois :

Le seul fait d'ouvrir un fichier obtenu par courrier électronique ou par un support informatique et de procéder à le supprimer ne constitue pas un élément de possession. De même, la manipulation de fichiers en bloc pour libérer de l'espace sur un support informatique et transférer en bloc ces fichiers sur un autre support informatique ne constitue pas nécessairement une possession. Il est toujours nécessaire d'évaluer, de façon concomitante,

<sup>71</sup> Voir R. c. Sharpe [2001] 1 R.C.S. 45, 2001 CSC 2, § 37-41.

<sup>72</sup> Voir R. c. Gilles Tremblay, 2001 IIJCan 10360; J.E. 2001-1459 (QC C.Q.) § 68 (= R. c. Gilles Tremblay).

<sup>73</sup> R. c. Vincent Tremblay, 2003 IIJCan 30621 (QC C.Q.), § 15 (= R. c. Vincent Tremblay); R. c. Beaver, [1957] R.C.S. 531 ; R. c. Terrence, [1983] 1 R.C.S. 357, 1983 CanLII 51, 364 541; R. c. Lévesque, 2004 IIJCan 32988 (QC C.A.), § 9.

<sup>74</sup> Voir R. c. Gilles Tremblay, § 66 : « que la récolte des photos et d'images ne peuvent être seulement le fruit du fait de naviguer sur Internet. Le résultat obtenu laisse voir une seule explication : il fallait un acte volontaire pour obtenir ces images. Le genre de photos et d'images, le nombre de photos et d'images et leur répétition ainsi que les techniques employées sont des indices sûrs et très probants. L'allégation d'interception au hasard par la défense ne peut tenir devant l'ensemble des faits » ; § 68 : « le téléchargement dans l'ordinateur de l'accusé était volontaire et non pas le fait du hasard. Le simple fait de naviguer sur Internet ne peut permettre que ce genre de matériel soit téléchargé sans geste volontaire. Le genre de photos, leur nombre, leur répétition ainsi que les techniques employées sont des indices sûrs et probants ».

<sup>75</sup> Voir R. c. Beaulieu, 2007 QCCQ 10487 (Can LII).

la connaissance de l'accusé à l'égard du matériel pour lequel il y a manipulation<sup>76</sup>.

Qu'en est-il de la sanction réservée aux personnes coupables de l'infraction pédopornographie en droit criminel canadien ?

### **2.3 — La répression de la pornographie juvénile en droit criminel canadien**

Le droit criminel canadien, dans le but de prévenir toute velléité malsaine d'exploitation sexuelle des personnes mineures, réprime sévèrement l'infraction de pédopornographie. En d'autres termes, pour le juge canadien dans l'arrêt *R. c. Sharpe* : « L'objectif principal que le législateur poursuivait en adoptant les dispositions sur la pornographie juvénile était de prévenir le préjudice causé aux enfants en interdisant la production, la distribution et la possession de pornographie juvénile et en transmettant aux Canadiens le message que les enfants ont besoin d'être protégés des effets terribles de l'exploitation et des agressions sexuelles et qu'on ne peut en faire des partenaires sexuels »<sup>77</sup>. Aussi tout ressortissant canadien qui commet à l'étranger un acte qui—s'il était commis au Canada—constituerait l'une des quelconques infractions sexuelles impliquant un enfant, peut être accusé et reconnu coupable par un tribunal canadien.

Les peines diffèrent selon la qualification de l'infraction. Aux termes de l'art. 163.1 (2) qui traite de la production de pornographie juvénile : « Quiconque produit, imprime ou publie, ou a en sa possession en vue de la publication, de la pornographie juvénile, est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans, la peine minimale étant d'un an ». Pour ce qui est de la distribution de pornographie juvénile l'art. 163.1 (3) dispose que « Quiconque transmet, rend accessible, distribue, vend, importe ou exporte de la pornographie juvénile ou en fait la publicité, ou en a en sa possession en vue de la transmettre, de la rendre accessible, de la distribuer, de la vendre, de l'exporter ou d'en faire la publicité, est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans, la peine minimale étant d'un an ». Pour l'infraction de possession de pornographie juvénile, l'art. 163.1 (4) dispose que « Quiconque a en sa possession de la pornographie juvénile est coupable : a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant d'un an; b) soit d'une infraction punissable

<sup>76</sup> *R. c. Vincent Tremblay*, § 18.

<sup>77</sup> *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, § 34 et 183.

sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois ».

L'art. 163.1 (4.1) punit l'accès à la pornographie juvénile : « Quiconque accède à de la pornographie juvénile est coupable : a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant d'un an ; b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois ». Aussi, accède à de la pornographie juvénile quiconque, sciemment, agit de manière à en regarder ou fait en sorte que lui en soit transmise.

Aux termes de l'art. 163.1 (4.3) du code criminel, constitue une circonstance aggravante lorsque l'infraction de pornographie juvénile est commise dans le dessein de réaliser un profit. Le producteur de pornographie juvénile ne peut avancer comme moyen de défense l'argument qu'il pensait que la personne mineure était âgée d'au moins dix-huit ans. Il ne peut user de ce moyen de défense que s'il démontre qu'il « a pris toutes les mesures raisonnables, d'une part, pour s'assurer qu'elle avait bien cet âge et, d'autre part, pour veiller à ce qu'elle ne soit pas présentée comme une personne de moins de dix-huit ans » : art. 163.1 (4.5). En outre, selon l'art. 163.1 (4.6), « Nul ne peut être déclaré coupable d'une infraction au présent article si les actes qui constitueraient l'infraction : a) ont un but légitime lié à l'administration de la justice, à la science, à la médecine, à l'éducation ou aux arts; b) ne posent pas de risque indu pour les personnes âgées de moins de dix-huit ans ».

Enfin, le code criminel canadien réprime l'infraction d'exhibitionnisme sur le mineur de moins de seize ans :

- (2) Toute personne qui, en quelque lieu que ce soit, à des fins d'ordre sexuel, exhibe ses organes génitaux devant une personne âgée de moins de seize ans est coupable : a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans, la peine minimale étant de quatre-vingt-dix jours ; b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de six mois, la peine minimale étant de trente jours<sup>78</sup>.

La province de l'Ontario au Canada dispose de nombreux services de police qui ont de l'expérience dans la réalisation des enquêtes relatives aux cas de pédopornographie. En 2007 par exemple, les enquêteurs ontariens ont arrêté 30 suspects et ont obtenu un taux de condamnation de plus de 90 %<sup>79</sup>.

<sup>78</sup> L.R.C. (1985), ch. C-46, art. 173 (2).

<sup>79</sup> Voir SETO, *Internet Sex Offender*, 54.

L'infraction de pédopornographie est réprimée par plusieurs instruments internationaux de protection des droits des enfants.<sup>80</sup>

### 3 — *La pédopornographie en droit international*

Il s'agit ici de présenter, bien que de manière laconique, quelques instruments internationaux de protection des personnes mineures contre les abus sexuels et spécialement contre l'infraction de pédopornographie.<sup>81</sup>

#### 3.1 — **La Convention des Nations Unies relative aux droits de l'enfant et le Protocole facultatif**

La Convention relative aux droits de l'enfant adoptée par l'Assemblée générale des Nations Unies en 1989<sup>82</sup> et le Protocole facultatif concernant la vente d'enfants, la prostitution des enfants et la pornographie mettant en

<sup>80</sup> Pour une étude historique de la réglementation des actes pédopornographiques dans l'Union européenne, au Canada et aux USA, voir Y. AKDENIZ, *Internet Child Pornography and the Law: National and International Responses*, Burlington, Ashgate, 2008, 141-209. Voir aussi pour la législation italienne et américaine, G.D. VARUVEL, « Il delitto di pornografia minorile da parte di un chierici », dans *Ap*, 87 (2014), 155-159 (= VARUVEL, « Il delitto di pornografia minorile »). Pour la dimension internationale de la pédopornographie, voir A. GILLESPIE, *Child Pornography Law and Policy*, Abingdon, Oxon-New York, Routledge, 2011, 287-303.

<sup>81</sup> La Charte des Nations Unies adoptée en 1945 reconnaît les droits fondamentaux de l'homme et les valeurs de la personne humaine. Même si cette charte ne traite pas spécifiquement des droits de l'enfant, elle a posé les jalons du Droit international des droits humains. La Déclaration Universelle des droits de l'Homme adoptée et promulguée le 10 décembre 1948 traduit la volonté de la communauté internationale de reconnaître des droits inaliénables de la personne humaine. Déjà en 1924, le préambule de la Déclaration de Genève affirmait : « Par la présente Déclaration des droits de l'enfant, dite déclaration de Genève, les hommes et les femmes de toutes les nations reconnaissent que l'humanité doit donner à l'enfant ce qu'elle a de meilleur, affirmant leurs devoirs, en dehors de toute considération de race, de nationalité, de croyance », <https://www.humanium.org/fr/texte-integral-declaration-de-geneve/> (03/03/2021).

<sup>82</sup> Convention internationale relative aux droits de l'enfant de New York, 20 nov. 1989, dans Rés. A.G. 44/25, Annexe [1992], R.T. Can. no 3 ; R.E.I.Q. (1990-92), 1992 (4), 361 : <https://www.unicef.fr/sites/default/files/convention-des-droits-de-lenfant.pdf>. Cette Convention est entrée en vigueur en droit international le 2 septembre 1990. Le Canada a signé la Convention le 28 mai 1990 et l'a ratifiée le 12 décembre 1991. La Convention est entrée en vigueur au Canada le 12 janvier 1992. Avant l'avènement de cette Convention, la Déclaration de Genève de 1924 (principe 4) et la Déclaration des droits de l'enfant de 1959 (principe 9) étaient les deux instruments internationaux traitant spécifiquement des enfants. Le Saint-Siège a signé et ratifié la Convention des Nations unies sur la Droits de l'enfant (1989) le 20 avril 1990.

scène des enfants<sup>83</sup> sont en droit international, les deux piliers de la lutte contre le tourisme sexuel impliquant des enfants. Ces instruments s'inscrivent dans un long processus d'évolution du droit international en matière de répression des crimes d'ordre sexuel<sup>84</sup>. L'article 1 de la Convention des Nations Unies relative aux droits de l'enfant adopte une définition large et internationale de l'enfant : « tout être humain âgé de moins de dix-huit ans, sauf si la majorité est atteinte plus tôt en vertu de la législation qui lui est applicable ». Aux termes de l'art. 34 de cette convention :

Les États parties s'engagent à protéger l'enfant contre toutes les formes d'exploitation sexuelle et de violence sexuelle. À cette fin, les États prennent en particulier toutes les mesures appropriées sur les plans national, bilatéral et multilatéral pour empêcher :

- a) Que des enfants ne soient incités ou contraints à se livrer à une activité sexuelle illégale ;
- b) Que des enfants ne soient exploités à des fins de prostitution ou autres pratiques sexuelles illégales ;
- c) Que des enfants ne soient exploités aux fins de la production de spectacles ou de matériel de caractère pornographique.

Le Protocole facultatif concernant la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants a été adopté le 25 mai 2000 au siège des Nations Unies à New York et est entré en vigueur le 18 janvier 2002. L'article 2 paragraphes a et b de ce protocole traite de la prostitution des enfants ainsi que de la pédopornographie. Il énonce :

Aux fins du présent Protocole :

- b) On entend par prostitution des enfants le fait d'utiliser un enfant aux fins d'activités sexuelles contre rémunération ou toute autre forme d'avantage ;
- c) On entend par pornographie mettant en scène des enfants toute représentation, par quelque moyen que ce soit, d'un enfant s'adonnant à des activités sexuelles explicites, réelles ou simulées, ou toute représentation des organes sexuels d'un enfant, à des fins principalement sexuelles.

En effet à l'introduction de ce Protocole, il est clairement énoncé que les États parties sont profondément préoccupés par la pratique répandue et persistante du tourisme sexuel auquel les enfants sont particulièrement exposés,

<sup>83</sup> Protocole facultatif à la Convention relative aux droits de l'enfant, concernant la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants, 25 mai 2000, <http://www.mrjf.gouv.qc.ca/content/documents/fr/ententes/2007-C01ORI.pdf> (04/04/2021).

<sup>84</sup> Voir J. ROBERGE, « Des solutions internationales et canadiennes à la problématique du tourisme sexuel impliquant des enfants », dans *Téoros Revue de recherche en tourisme*, 22 (2003), 5 (= ROBERGE, « Des solutions internationales »).

dans la mesure où il favorise directement la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants<sup>85</sup>.

### 3.2 — La Convention de Budapest sur la cybercriminalité

Rédigée par le Conseil de l'Europe, la Convention sur la cybercriminalité du 23 novembre 2001 traite des crimes informatiques, des crimes dans Internet, des crimes de la pornographie infantile, ainsi que l'atteinte au droit d'auteur et le discours de haine<sup>86</sup>. Aux termes de l'art. article 9 de cette Convention internationale :

1. Chaque Partie adopte les mesures législatives et autres qui se révèlent nécessaires pour ériger en infraction pénale, conformément à son droit interne, les comportements suivants lorsqu'ils sont commis intentionnellement et sans droit :
  - a. la production de pornographie infantile en vue de sa diffusion par le biais d'un système informatique ;
  - b. l'offre ou la mise à disposition de pornographie infantile par le biais d'un système informatique ;
  - c. la diffusion ou la transmission de pornographie infantile par le biais d'un système informatique ;
  - d. le fait de se procurer ou de procurer à autrui de la pornographie infantile par le biais d'un système informatique ;
  - e. la possession de pornographie infantile dans un système informatique ou un moyen de stockage de données informatiques.
2. Aux fins du par. 1 ci-dessus, le terme « pornographie infantile » comprend toute matière pornographique représentant de manière visuelle :
  - a. un mineur se livrant à un comportement sexuellement explicite ;
  - b. une personne qui apparaît comme un mineur se livrant à un comportement sexuellement explicite ;
  - c. des images réalistes représentant un mineur se livrant à un comportement sexuellement explicite.
3. Aux fins du par. 2 ci-dessus, le terme « mineur » désigne toute personne âgée de moins de 18 ans. Une Partie peut toutefois exiger une limite d'âge inférieure, qui doit être au minimum de 16 ans.
4. Une Partie peut se réserver le droit de ne pas appliquer, en tout ou en partie, les par. 1, al. d et e, et 2, al. b. et c.

Le fait que le texte de cette convention sur la cybercriminalité laisse une large place à l'interprétation individuelle et aux variations nationales est pour

<sup>85</sup> Voir *ibid.*, 8-9.

<sup>86</sup> CONSEIL DE L'EUROPE, Convention sur la cybercriminalité, 23 novembre 2001, <http://conventions.coe.int/Treaty/fr/Treaties/Html/185.htm> (10/04/2021).

certaines une faille car les auteurs des crimes dans internet se moquent des frontières.<sup>87</sup>

### 3.3 — La Convention du Conseil de l'Europe sur la protection des enfants contre l'exploitation et les abus sexuels

La Convention du Conseil de l'Europe sur la protection des enfants contre l'exploitation et les abus sexuels (la convention de Lanzarote) de 2007 en son art. 20 (2) définit la pornographie infantile comme : « tout matériel représentant de manière visuelle un enfant se livrant à un comportement sexuellement explicite, réel ou simulé, ou toute représentation des organes sexuels d'un enfant à des fins principalement sexuelles »<sup>88</sup>. Aussi, selon l'art 20 (1), les infractions pénales se rapportant à la pornographie enfantine (« toute personne âgée de moins de dix-huit ans »<sup>89</sup>) sont : la production de pornographie enfantine ; l'offre ou la mise à disposition de pornographie enfantine ; la diffusion ou la transmission de pornographie enfantine ; le fait de se procurer ou de procurer à autrui de la pornographie enfantine ; la possession de pornographie enfantine ; le fait d'accéder, en connaissance de cause et par le biais des technologies de communication et d'information, à de la pornographie enfantine. Cette convention malheureusement n'encadre pas juridiquement les nouvelles formes d'exploitation sexuelles des enfants en ligne telle la *sextortion* ou la pornographie virtuelle. De surcroît, aux termes de son art 20 (1; 3), les États parties ont le droit de ne pas criminaliser la pornographie virtuelle.

<sup>87</sup> Voir É. WERY, *Sexe en ligne : aspects juridiques et protection des mineurs*, Bruxelles, Larcier, 2004, 55.

<sup>88</sup> CONSEIL DE L'EUROPE, Convention du Conseil de l'Europe sur la protection des enfants contre l'exploitation et les abus sexuels, 25 octobre 2007, <http://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/0900001680084833> (20 juin 2017). Cette convention a été ouverte à la signature des États le 25 octobre 2007 à Lanzarote (Espagne) et est entrée en vigueur le 1<sup>er</sup> juillet 2010. Voir M. RIONDINO, « La convention de Lanzarote. Aspetti giuridici e canonici in tema di abuso sui minori », dans *Ap*, 86 (2013), 150-151. Voir aussi GILLESPIE, « Legal definitions », 19-20. Pour la compréhension de la pornographie dans les documents de l'Église, voir BARTCHAK, « Child Pornography and the Grave Delict », 292-305. Pour la typologie de la pornographie infantile et sa corrélation entre la pédopornographie et les abus sexuels sur des mineurs, voir VARUVEL, « Il delitto di pornografia minore », 152-155. Pour l'historique de l'incrimination de la pédopornographie dans le système français, voir S. PRAT et al. (dir.), « Évolution des aspects juridiques de la pornographie infantile en France », dans *La revue de médecine légale*, 3 (2012), 157-161.

<sup>89</sup> Voir Décision-cadre n° 2004/68/JAI du Conseil du 22 décembre 2003 relative à la lutte contre l'exploitation sexuelle des enfants et la pédopornographie du Conseil de l'Europe, J.O.C.E. L 13 du 20/01/2004, aux pages 44-48, <http://eurlex.Europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:013:0044:0048:FR:PDF> (10/04/2021).



### 3.4 — La Charte Africaine des Droits et du Bien-être de l'Enfant

La Charte Africaine des Droits et du Bien-être de l'Enfant (CADBE) fut adoptée en 1990 par l'Organisation de l'Unité Africaine (OUA, aujourd'hui Union Africaine). L'élaboration et l'adoption de ce premier traité régional sur les droits de l'enfant répondent en partie au sentiment de certains que la Convention des Nations Unies ne reflétait pas les priorités et les préoccupations relatives aux enfants sur le continent africain. La CADBE a ainsi été rédigée dans le but de mettre en avant, de manière spécifique et explicite, la culture et le patrimoine africain<sup>90</sup>. L'art. 27 de la CADBE traite de l'exploitation sexuelle des enfants :

Les États parties à la présente Charte s'engagent à protéger l'enfant contre toute forme d'exploitation ou de mauvais traitements sexuels et s'engagent en particulier à prendre des mesures pour empêcher :

- a) l'incitation, la coercition ou l'encouragement d'un enfant à s'engager dans toute activité sexuelle ;
- b) l'utilisation d'enfants à des fins de prostitution ou toute autre pratique sexuelle ;
- c) l'utilisation d'enfants dans des activités et des scènes ou publications pornographiques.

On se rend bien compte que, dans la réalité, la pauvreté de beaucoup de pays d'Afrique, la porosité du système judiciaire ainsi que d'autres facteurs font que les crimes de pédopornographie sont moins réprimés. Cette fragilité crée un terreau favorable au tourisme sexuel d'enfants et aux multiples exploitations sexuelles. Puisque l'internet ne connaît pratiquement pas de frontières aujourd'hui et qu'il importe de lutter fermement contre le phénomène international de la pédopornographie, il convient que les États coopèrent davantage afin d'appréhender les auteurs de tels abus contre les personnes mineures<sup>91</sup>. Au niveau interne des États, il convient de fustiger l'exhibition des images et des vidéos à caractère pornographiques impunément étalées pour vente dans certains marchés des pays d'Afrique. Ces images sont souvent exposées à la vue du passant y compris les enfants. De

<sup>90</sup> Voir A. TWUM-DANSO IMOH, « Realizing Children's Rights in Africa: An Introduction », dans A. NICOLA (dir.), *Children's Lives in an Era of Children's Rights: the Progress of the Convention on the Rights of the Child in Africa*, New York, Routledge, 2014, 4-5.

<sup>91</sup> Le rapport Fonds des Nations Unies pour l'enfance de 2017 souligne les fractures numériques qui existent dans le monde actuel. Le double défi étant d'atténuer les effets nocifs de la technologie numérique qui fait désormais partie intégrante de nos vies, et d'optimiser les avantages d'Internet pour chaque enfant. Voir UNICEF, *Mieux protéger les enfants dans un monde numérique tout en améliorant l'accès à Internet des plus défavorisés*, 11 décembre 2017, <https://www.unicef.org/fr/communiqués-de-presse/unicef-mieux-protéger-les-enfants-dans-un-monde-numérique-tout-en-améliorant> (11/04/2021).

surcroît leurs acquéreurs ne sont pas toujours des personnes majeures. Ces images et les médias influencent sur les croyances, attitudes et comportements des enfants et adolescents. Ceci peut se traduire notamment par la violence, les désordres alimentaires, la consommation d'alcool et du tabac, la sexualité parfois à risque, un sentiment d'angoisse et d'évitement de la sexualité à cause de l'exposition aux images pornographiques qui ont été vécues de manière traumatisante<sup>92</sup>.

Les diverses dispositions juridiques que nous venons d'exposer définissent et répriment le crime de pédopornographie avec des nuances singulières. Une approche comparative de ces législations aurait l'avantage de faire apparaître les mérites ou alors permettre de déceler des faiblesses de l'un ou de l'autre texte législatif ou conventionnel. Nous nous limiterons ici à souligner quelques éléments de comparaison entre le droit de l'Église qui suit un modèle de droit civiliste ou continental<sup>93</sup> et le droit criminel canadien fondé sur la *Common Law*.

#### 4 — Quelques éléments de comparaison

La manière donc le législateur pénal de l'Église et celui du Canada définissent et punissent le crime de pédopornographie peut être comparée.

##### 4.1 — Sur la définition du crime de pédopornographie par le législateur canonique et canadien

La volonté du législateur pénal canonique et canadien pour mieux définir le crime de pédopornographie afin de mieux le réprimer est perceptible et louable. Toutefois cet effort de clarté et de précision est davantage visible chez le législateur criminel canadien. Bien que le législateur pénal canonique parvienne à définir en quelques lignes le contenu de « Matériel pédopornographique » à l'art. 1 § 2c. de *VELM*, il ne procède pas à une spécification plus précise comme le fait son homologue canadien (L.R.C. 1985, ch. C46, art. 163.1). Ceci présente l'inconvénient de rendre la tâche moins aisée au juge pénal canonique qui doit alors chercher à savoir si l'acte posé rentre

<sup>92</sup> Voir M. KOUAMÉ N'DRI et al., « Images pornographiques et comportements sexuels des élèves dans l'arrondissement de Cocody à Abidjan », dans *Santé Publique*, 27 (2015), 734. Voir aussi N. MOLLEMA et S.S. TERBLANCHE, « Child Pornography in South Africa », dans *South African Journal of Criminal Justice*, 24 (2011), 283-308.

<sup>93</sup> Voir MORRISEY, « Canon Law Meets Civil Law », dans *StC*, 32 (1998), 185.

bien dans la catégorie des délits contre le sixième commandement du Décalogue et plus précisément du délit de pédopornographie du nouveau canon 1398 *CIC/83* et de l'art. 1 § 1a, iii de *VELM*.

Pour ce qui est de la *mens rea*, les deux législateurs insistent bien sur la nécessité de celui-ci pour la réalisation du crime. Les actes incriminés doivent être commis à des fins immorales ou « à des fins principalement sexuelles » et en toute connaissance de cause. La théorie des trois C (connaissance, consentement et contrôle) permet de mieux cerner la volonté libre du cyberdélinquant dans la commission de l'acte incriminé.

## 4.2 — Au sujet de l'infraction du leurre

L'infraction du leurre prévue l'art. 172.1 (1) du Code criminel canadien permet au législateur criminel de ce pays de poursuivre les délinquants adultes qui utilisent les technologies de l'Internet (sites de réseautage social, salons de bavardage messagerie instantanée, courriel) pour approcher des enfants et des jeunes et les inviter à participer à des activités telles que le clavardage d'images sexuellement explicites ou éventuellement à se rencontrer (en personne) afin de commettre une infraction sexuelle par contact. Ces individus que Michael Seto qualifie de « délinquants de sollicitation en ligne », ou de « délinquants de leurre ou de voyage » parviennent à réaliser des interactions sexuelles avec une personne mineure sans aucun contact physique. D'où la nécessité des lois nouvelles pour empêcher ces individus d'utiliser Internet pour commettre ce nouveau type d'infraction<sup>94</sup>.

Ces gestes dits préparatoires qualifiés d'infraction du leurre visés à l'art. 172.1 (1) du Code criminel canadien ne semblent pas être amplement régis par le législateur pénal canonique. Doit-on considérer que ce type d'infraction est compris dans les stipulations du canon 1398 § 1, 3<sup>o</sup> et de l'art. 1 § 1a, iii de *VELM* ? La traduction française du canon 1398 § 2, 2<sup>o</sup> capture tant bien que mal ledit délit par les termes « recrute ou conduit ». La traduction anglaise fait usage des mots « groomers or indues » qui reflètent davantage les actes répréhensibles du crime du leurre sanctionné à l'art. 172.1 (1) du Code criminel canadien. On sait par contre que le Vademecum de la CDF, dans sa description des délits prévus par l'art. 6 de *SST*, adopte une typologie du délit très large qui peut inclure, par exemple, les relations sexuelles consenties et non consenties, le contact physique avec arrière-pensée sexuelle, l'exhibitionnisme, la masturbation, la production de pornographie, l'incitation à la prostitution, les conversations et/ou avances à caractère sexuel, même sur les réseaux

<sup>94</sup> Voir SETO, *Internet Sex Offender*, 71.

sociaux<sup>95</sup>. Mais encore, ce guide pratique de la CDF n'est pas une loi. Il nous semble qu'une clarification sur ce point serait bénéfique car, en matière pénale, il convient d'éviter l'imprécision dans la détermination d'une infraction.

#### **4.3 — Sur la sanction du crime de pédopornographie par le législateur canonique et canadien**

Tant le législateur criminel canadien que le législateur pénal canonique punissent sévèrement le crime de pédopornographie. Le législateur canonique par la phrase telle que « sera puni de la privation de l'office et d'autres justes peines, y compris, si c'est le cas, le renvoi de l'état clérical » fait montre d'un effort louable pour préciser le type de peines encourue par le délinquant. Par l'expression « juste peine » il ne détermine pas la peine supplémentaire à attribuer au coupable du délit de pédopornographie. Il laisse cette détermination au juge qui jouit alors d'une grande marge de manœuvre dans l'imposition des peines, tenant compte des circonstances particulières au cas d'espèce. Le code criminel canadien par contre établit les limites, mieux des plages, où les peines doivent être choisies. Par exemple pour la production et la distribution de matériel pédopornographique : un « emprisonnement maximal de quatorze ans, la peine minimale étant d'un an ». Cette détermination préalable du nombre d'années d'emprisonnement encourues permet d'apprécier assez rapidement les conséquences de l'acte posé et aide le juge à déterminer la peine proportionnée au crime. Elle peut aussi laisser moins de marge de manœuvre au juge en cas de gravité extrême des faits reprochés.

### ***Conclusion***

Du fait qu'elle exploite les personnes particulièrement vulnérables que sont les mineurs, la pédopornographie est incriminée aussi bien par le législateur canonique que par les législateurs séculiers. Il est important de ne pas ignorer que les pédopornographes peuvent être des enseignants, des avocats, des médecins, des agents de la force publique, des membres du clergé, des ouvriers, des exploiters sexuels intrafamiliaux et extrafamiliaux<sup>96</sup>. On peut aujourd'hui affirmer avec Suzanne Ost que la pornographie infantile et la sollicitation sexuelle en ligne sont des maux modernes et prolifiques de la

<sup>95</sup> Voir CDF, Vademecum, n° 2.

<sup>96</sup> Voir TYLER et STONE, « Child Pornography », 315.

société et constituent une menace toujours plus grande pour les enfants. Les ordinateurs et l'internet ont sans aucun doute contribué à l'augmentation de la prévalence de la pornographie infantile et de la manipulation psychologique des enfants au cours des vingt dernières années<sup>97</sup>. Ce phénomène est contraire aux valeurs morales prônées par l'Église<sup>98</sup>. Une Église qui, tout en cherchant à préserver la spécificité de son système pénal, doit davantage communiquer et collaborer avec celui des différents États. Ceci dans le souci d'une meilleure compréhension et répréhension des crimes qui attentent à la dignité de la personne humaine et particulièrement de celle des personnes mineures.

<sup>97</sup> Voir S. OST, *Child Pornography and Sexual Grooming: Legal and Societal Responses*, Cambridge, Cambridge University Press, 2009, 26. Au Québec par exemple, le nombre d'arrestations en lien avec des délits relatifs à l'exploitation sexuelle d'enfants sur Internet a augmenté de 102 % entre 2006 et 2012, s'établissant au compte de 231 arrestations pour l'année 2012. Voir K.M. BABCHISHIN, S. PAQUETTE et al., « Les consommateurs de pédopornographie », dans F. CORTONI et T.H. PHAM (dir.), *Traité de l'agression sexuelle, Théories explicatives : évaluation et traitement des agresseurs sexuels*, Bruxelles, Mardaga, 2017, 252. Pour les différents types de sollicitation des personnes mineures en ligne, voir SETO, *Internet Sex Offender*, 71-115. Pour la typologie des solliciteurs en ligne, voir D. DEHART et al. (dir.), « Internet Sexual Solicitation of Children: A Proposed Typology of Offenders Based on Their Chats, E-Mails, and Social Network Posts », dans *Journal of Sexual Aggression*, 73 (2017), 77-89.

<sup>98</sup> Voir FRANÇOIS, Discours aux participants du colloque sur la dignité de l'enfant dans le monde numérique, 6 Octobre 2017, texte original italien dans l'OR du 7 Octobre 2017, Traduction française, [http://w2.vatican.va/content/francesco/fr/speeches/2017/october/documents/papa-francesco\\_20171006\\_congresso-childdignity-digitalworld.html](http://w2.vatican.va/content/francesco/fr/speeches/2017/october/documents/papa-francesco_20171006_congresso-childdignity-digitalworld.html). Voir aussi CONSEIL PONTIFICAL POUR LES COMMUNICATIONS SOCIALES, « Pornographie et violence dans les moyens de communication sociale : une réponse pastorale », 7 Mai 1989, dans *DC*, 1986 (1989), 588, n<sup>os</sup> 6, 7, 10 et 11 ; R. BLÁZQUEZ PÉREZ, « La protección de los menores en la Iglesia », dans *IC*, 60 (2020), 1-12.

## THE SUBMISSION OF A *LIBELLUS* BY A PROCURATOR IN A MARITAL NULLITY PROCESS

MICHAEL-ANDREAS NOBEL

**SUMMARY** — The right to challenge a marriage rests with the spouses, and, if circumstances warrant it, the promoter of justice. A *petitio* must be presented to a competent tribunal or judge to commence the procedure; the trial begins after the *petitio*, which has to fulfill certain canonical requirements, be accepted by the judicial vicar, and the respondent legitimately cited. A twofold distinction is necessary: firstly, the oral petition is reserved to the petitioner, and only he or she can present it; secondly, the law permits that a *libellus* be signed and presented by the petitioner or a properly mandated procurator. This procurator can act on behalf of the party in the case. This study intends to discuss the competencies as well as the limitations of a procurator in the context of the *petitio*: is it possible that a procurator can prepare, sign, and present a *libellus* on behalf of the petitioner?

**RÉSUMÉ** — Le droit de contester un mariage appartient aux époux et, si les circonstances le justifient, au promoteur de la justice. Une *petitio* doit être présentée à un tribunal ou à un juge compétent pour introduire la cause ; le procès commence quand la *petitio*, qui doit remplir certaines conditions canoniques, est acceptée par le vicaire judiciaire et la partie appelée est légitimement citée. Une distinction double est à faire : premièrement, la demande orale est réservée à la partie demanderesse et elle seule peut la présenter ; deuxièmement, la loi permet qu'un libelle puisse être signé et présenté par la partie demanderesse ou un procureur dûment mandaté. Ce procureur peut agir au nom de la partie demanderesse. L'intention de cette étude est de discuter les compétences ainsi que les limites d'un procureur dans le contexte de la *petitio* : est-il possible qu'un procureur puisse préparer, signer et présenter un libelle au nom de la partie demanderesse ?

## *Introduction*

This study will give a brief overview of the function of the procurator and the requirements for a legitimate petition. It will also examine the question of whether or not a procurator can “submit” a legitimate *petitio* at a competent ecclesiastical tribunal to commence a process to obtain a declaration of nullity of marriage.

In part, canon 1476 of the Code of Canon Law states that “anyone, whether baptized or not, can bring action in a trial.” Consequently, anyone who has a right to stand in trial can bring forward an action.<sup>1</sup> This reflects the prescript of canon 221 § 1: “The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law.” Similarly, canon 1400 states: § 1. The object of a trial is: 1° the pursuit or vindication of the rights of physical or juridic persons, or the declaration of juridic facts.” Canon 1401 further determines the objects of a trial: “1° cases which regard spiritual matters or those connected to spiritual matters; 2° the violation of ecclesiastical laws and all those matters in which there is a question of sin, in what pertains to the determination of culpability and the imposition of ecclesiastical penalties.” Lastly, relative to marriage cases, canon 1671 § 1 states that “marriage cases of the baptized belong to the ecclesiastical judge by proper right.” Three categories of persons have a right to submit a *petitio* at a competent tribunal to commence a procedure for the declaration of nullity of marriage; two are directly mentioned in canon 1674: “1° the spouses; 2° the promoter of justice when nullity has already become public, if the convalidation of the marriage is not possible or expedient.” The third category concerns a legitimately mandated procurator.

## *1 — The Notion of Procurator*

The notion of a procurator will be discussed in this section with regard to requirements, appointment, and removal.<sup>2</sup> If necessary, a distinction will be made between “anyone” who can be appointed procurator, and the petitioner’s

<sup>1</sup> See M. NOBEL, “*Persona standi in iudicio*,” in *SCL*, 7 (2011), 171 (= NOBEL, “*Persona standi in iudicio*”).

<sup>2</sup> The author recognizes that there are other elements, but the focus of this study is on the petitioner’s procurator who intends to submit a *libellus* on behalf of the petitioner in the context of a marriage procedure. Therefore, the elements to be discussed are limited to three: requirements, appointment, and removal.

option to choose a procurator from a list approved by the bishop moderator of the tribunal.

## 1.1 — Requirements

Canon 1483 recognizes only two requirements for a person to act as a procurator: “The procurator ... must have attained the age of majority and be of good reputation.” The age of majority is necessary to have a right to stand in trial and to place juridic acts,<sup>3</sup> and the “good reputation”<sup>4</sup> is a requirement set by the legislator, although it partially<sup>5</sup> appears to be rather subjective in nature.<sup>6</sup> The Instruction *Dignitas connubii*, article 105 § 1, recognizes only a good reputation as a requirement for a procurator.<sup>7</sup>

<sup>3</sup> See F.X. VON WEBER, *Der Rechtsanwalt im katholischen Kirchenrecht: ausgewählte Fragen zum Anwaltsrecht nach dem Codex Iuris Canonici 1983*, Freiburg, Schweiz, Universitätsverlag, 1990, 12-13 (= VON WEBER, *Rechtsanwalt*); see K. LÜDICKE and R.E. JENKINS, *Dignitas Connubii. Norms and Commentary*, Alexandria, Canon Law Society of America, 2006, 187 (= LÜDICKE and JENKINS, *Dignitas Connubii*).

<sup>4</sup> On the notion of the term *fama*, see F. KALDE, “Der Richter und sein Ruf. Zu einer Voraussetzung richterlicher Tätigkeit,” in *DPM*, 1 (1994), 37-45.

<sup>5</sup> VON WEBER, *Rechtsanwalt*, 14-15, offers some objective criteria on how someone can lose one’s good reputation: “Des guten Leumunds verlustig geht die Person, wenn über sie eine kirchliche Spruchstrafe nach can. 1331 §2 verhängt worden ist. Unterliegt sie einer Tatstrafe, hat diese solange keinen Einfluss auf die Ehrenstellung der Person, als das Delikt nicht bekannt geworden ist. Denkbar ist auch der Verlust des guten Rufes im kirchenrechtlichen Sinne auch durch ein weder vom kirchlichen noch vom staatlichen Strafrecht verpöntes Verhalten, sondern durch öffentliches, von der Kirche als unsittlich taxiertes Handeln, z.B. durch offenkundiges oder öffentliches Konkubinat oder durch blosse Zivilehe von Formpflichtigen. Die Beurteilung solcher durch das geänderte Wertempfinden entstandener Grenzfälle steht im Ermessen des Diözesanbischofs.... Das Festhalten an einem anderen als von der weltlichen Sparte erforderlichen Ehrhaftigkeitsniveaus entspricht aber der Natur des Kirchenrechts mit seinen rechtstheologischen Grundlagen. Das hohe Anspruchsniveau auf Seiten des Zulassungsbewerbers erfordert gleichzeitig auch ein hohes Niveau in der Zulassungspraxis der Bischöfe.” Furthermore, he says that excommunicated Catholics, by reason of c. 1331 § 1, 3°, as well as those subject to expiatory penalties according to c. 1336 § 1, 2°-3°, cannot exercise the function of advocate (or procurator). *Ibid.*, 15.

<sup>6</sup> See C. GULLO and A. GULLO, *Prassi processuale nelle cause canoniche di nullità del matrimonio. Terza edizione aggiornata con l’Instr. “Dignitas connubii” del 25 gennaio 2005*, Vatican City, Libreria Editrice Vaticana, 2008 (= GULLO and GULLO, *Nullità del matrimonio*), 57: “Requisito comune ad entrambi, procuratore ad avvocato, secondo la legge, è quello di essere maggiorenni e persone di buona fama; dunque, avere almeno compiuto i diciotto anni e godere di una buona fama; non si richiede cioè né una straordinaria integrità di vita cristiana né un’attiva partecipazione alla vita della comunità ecclesiale, requisiti il cui possesso è esigito dalla “*Iusti iuicis*” (art. 3 n. 1) per gli avvocati della Curia Romana.”

<sup>7</sup> See LÜDICKE and JENKINS, *Dignitas Connubii*, 187: “The requirement that the person enjoy a good reputation is certainly reasonable, but it is also rather impractical. Despite the provision of



Unlike an advocate who, according to canon 1483, “must be a Catholic unless the diocesan bishop permits otherwise,”<sup>8</sup> a procurator need not be Catholic.<sup>9</sup> Furthermore, canon 1483 requires that an advocate must be “a doctor in canon law or otherwise truly expert, and approved by the same bishop.”<sup>10</sup> Since the procurator acts on behalf of the petitioner and does not provide any legal expertise,<sup>11</sup> a specific canonical formation is not necessary but can be advantageous,<sup>12</sup> at least for those procurators approved by the bishop moderator for this office at the local tribunal or who act as procurator-advocate for a party.<sup>13</sup> Lastly, unlike an advocate, a freely appointed procurator does not need to be approved by the bishop moderator.<sup>14</sup>

## 1.2 — Appointment

According to canon 1481 § 1, a party can freely appoint a procurator. A twofold distinction of the term “freely appoint” is permissible in the context

§3, there is no licensing procedure for the admission of a procurator, and so no concrete means is in place for the determination of whether or not this particular qualification has been met. Mere doubt as to a person’s good reputation should not constitute the grave cause mentioned in Art. 109 that could lead to the rejection of the procurator by the sole judge or the *praeses*.<sup>9</sup>

<sup>8</sup> See VON WEBER, *Rechtsanwalt*, 15-19.

<sup>9</sup> See M.F. POMPEDDA, “Diritto processuale nel nuovo codice di diritto canonico. Revisione o innovazione,” in *Ephemerides Iuris Canonici*, 39 (1983), 213-214. See also VON WEBER, *Rechtsanwalt*, 105.

<sup>10</sup> See also DC, art. 105: “§ 1. The procurator and advocate must be of good reputation; in addition, the advocate must be a Catholic, unless the Bishop Moderator allows otherwise, and a doctor in canon law, or otherwise truly expert, and approved by the same Bishop (cf. can. 1483).” See VON WEBER, *Rechtsanwalt*, 19-23; see also K.-T. GERINGER, “Das Recht auf Verteidigung im kanonischen Ehenichtigkeitsverfahren,” in *AkK*, 155 (1986), 430-431; see P.V. PINTO, *I processi nel Codice di diritto canonico. Commento sistematico al Lib. VII*, Vatican City, Libreria Editrice Vaticana, 1993 (= PINTO, *I processi*), 202.

<sup>11</sup> See PINTO, *I processi*, 201; see also GULLO and GULLO, *Nullità del matrimonio*, 54.

<sup>12</sup> On the requirement in the Instruction *Provida Mater*, art. 48 § 3 for a specific formation for procurators, e.g. at least a licentiate in canon law and a one-year apprenticeship, see SACRED CONGREGATION FOR THE DISCIPLINE OF SACRAMENTS, Instruction *Provida Mater*, August 15, 1936, in AAS, 27 (1936), 313-361; Engl. transl. in W.J. DOHENY, *Canonical Procedure in Matrimonial Cases*, vol. I, *Formal Judicial Procedure*, Milwaukee, The Bruce Publishing Company, 1948. See also P. CIPROTTI, “De advocatis et procuratoribus in causis de nullitate matrimonii,” in *Ap*, 10 (1937), 467.

<sup>13</sup> Procurators do not have to be registered through a list of approved procurators nor do they have to be approved by the diocesan bishop. Flatten questions: “Das Gericht hat es also nicht mehr in der Hand, wer alles an der Vernehmung teilnimmt und in die Prozessakten Einsicht nimmt.” See H. FLATTEN, *Gesammelte Schriften zum kanonischen Ehe recht*, H. Müller (ed.), Paderborn, Schöningh, 1987, 459.

<sup>14</sup> On the approbation of procurators by the diocesan bishop see c. 1658 § 2 CIC/1917.

of marriage procedures: a) the petitioner can choose any person he or she desires as long as that person fulfills the minimum requirements;<sup>15</sup> and b) the petitioner can appoint a procurator at any stage of the process.

Canon 1483 outlines two minimum requirements for someone to be appointed procurator. In case the petitioner cannot come to a conclusion or is unable<sup>16</sup> to present someone to exercise this function and wishes to have a procurator, he or she may mandate a procurator from a list of procurators appointed to that office by the bishop moderator.<sup>17</sup> Canon 1490 states: "As far as possible, legal representatives are to be appointed in a stable manner in each tribunal, who receive a stipend from the tribunal and are to exercise, especially in marriage cases, the function of advocate or procurator on behalf of parties who wish to select them." Canon 1483 does not provide any jurisdictional limitations. The petitioner can appoint anyone, even if the procurator resides in a different diocese, conference of bishops, etc.<sup>18</sup> Should a petitioner select a procurator from a list of procurators according to canon 1490, these procurators, approved by the bishop moderator for this office, can exercise this function within the determined jurisdiction, e.g., the diocese or, in case of an inter-diocesan tribunal, the dioceses that are part of the inter-diocesan tribunal.<sup>19</sup> Nevertheless, *Dignitas connubii*, article 105 § 3, permits: "The *prae-ses* because of special circumstances can approve as procurator *ad casum* someone who does not reside in the territory of the tribunal."<sup>20</sup> This raises

<sup>15</sup> See PINTO, *I processi*, 200.

<sup>16</sup> The inability to appoint a procurator refers to a party ignoring his or her right to appoint a procurator or the party simply does not know whom to appoint. It does not refer to psychic incapacity, which would equate the party to a minor. Pinto states: "Parallelamente a quanto ordinato nel can. 1478, non possono nominare il procuratore e avvocato, coloro la cui capacità processuale è impedita; mentre per le persone giuridiche, spetta al legittimo rappresentante, a norma degli statuti." PINTO, *I processi*, 200, footnote 284.

<sup>17</sup> See also DC, art. 112: "§ 1. It pertains to the Bishop Moderator to publish an index or directory in which there are listed the advocates admitted before his tribunal and the procurators who usually represent parties there."

<sup>18</sup> See LÜDICKE and JENKINS, *Dignitas Connubii*, 189-190: "The procurator's place of residence is irrelevant as far as appointment by the parties is concerned. Nor does the presiding judge have to approve or otherwise give permission for a particular procurator to function. Thus, the code would not permit a judge to exclude a person from functioning as procurator based solely on the fact that he or she does not have residence within the territory of the tribunal."

<sup>19</sup> See *ibid.*, 189: "This is a practical provision of the Instruction. A procurator is expected to have a residence in the jurisdiction of the court since he will be functioning on a regular basis at the court."

<sup>20</sup> Müller concludes: "Der Vorsitzende kann nach Art. 105 § 3 DC wegen besonderer Umstände jemanden als Prokurator für einen einzelnen Fall zulassen, der nicht im Gebiet des Gerichts wohnt. Im Umkehrschluss heißt dies, dass der Prokurator, der keiner Zulassung bedarf (vgl. Art. 105 § 1 DC), grundsätzlich im Gebiet des Gerichts wohnen muss." See M. MÜLLER,

some questions: a) Does *Dignitas connubii* refer to the appointment of a procurator who, according to canon 1490, is on a list of procurators in another diocese? If so, it does not pose any conflict since the already recognized procurator can be approved *ad casum* to exercise the same function in another tribunal. b) If *Dignitas connubii* refers to a petitioner who appoints someone outside the scope of canon 1490 who does not live in the same diocese, does this person need to be approved by the *praeses* as procurator *ad casum*, which would be contrary to the prescript of canon 1483? As stated above, canon 1483 does not include any jurisdictional restrictions on a freely appointed procurator who is not on a list of approved procurators.

Some harmonization is necessary between the provisions of the Code of Canon Law and *Dignitas connubii*. In addition to the conflict cited above, and adhering to the strict interpretation according to canon 18, it is the *praeses* (according to *Dignitas connubii*, article 105 §3) who makes the determination of approving a procurator. However, canon 1676 reads:

§2. ... the judicial vicar is to determine by his decree the formula of the doubt and is to decide whether the case is to be treated with the ordinary process or with the briefer process according to cann. 1683-1687. This decree is to be communicated immediately to the parties and the defender of the bond.

§3. If the case is to be handled through the ordinary process, the judicial vicar, by the same decree, is to arrange the constitution of a college of judges or of a single judge with two assessors according to can. 1673 §4.

In the context of appointing a procurator prior to the *petitio* being presented, there is no *praeses* yet appointed, and the instruction clearly refers to “the *praeses*,” not “a judge,” which could have been interpreted to include the judicial vicar. The changes brought about by the promulgation of the *motu proprio Mitis Iudex Dominus Iesus* include that the *praeses* is determined by the judicial vicar after the formulation of doubt. This leaves the question of who, because of special circumstances, can approve as procurator *ad casum* someone who does not reside in the territory of the tribunal. The law has a *lacuna legis*, and the prescript of *Dignitas connubii*, article 105 §3, cannot be applied in the context of the submission of a *petitio*: the *praeses* is a specifically designated function that exists once a collegiate tribunal has been established.<sup>21</sup>

“Die Rechtslage zur Aufnahme in das und zur Streichung aus dem Verzeichnis der am Gericht zugelassenen Advokaten und der am Gericht tätigen Prokuratoren nach Art. 112 der Eheprozessordnung *Dignitas Connubii*,” in *DPM*, 14 (2007), 277.

<sup>21</sup> If a collegiate tribunal cannot be established, the function of *praeses* is exercised by the sole judge as far as possible.

One must remember that the appointment of a procurator is optional for marriage cases. If circumstances warrant it and the judicial vicar, prior to the formulation of doubt (or the presiding judge or *praeses* after the formulation of doubt) find it necessary for a petitioner to have a procurator, *Dignitas connubii*, article 46 § 2, must be observed: "It pertains to the *praeses* of the college: 6° to provide for the ministry of a procurator or advocate in accordance with artt. 101 §§ 1, 3; 102; 105 § 3; 106 § 2; 109; 144 § 2." This is to ensure and safeguard the rights of the parties. However, one must carefully interpret this prescript in connection with canon 1481: "While the law does not bar tribunals from appointing advocates *ex officio* for parties, only a party can designate a procurator (c. 1481). If a court-designated procurator functions in a trial, the process is incurably null (c. 1620, 6°)." A tribunal's standard formularies can include a mandate for the appointment of procurator-advocate to be signed by the parties.<sup>22</sup>

In the context of appointment, special attention must also be given to *Dignitas connubii*, article 36 § 3: "It is not permitted for the ministers of the tribunal to exercise, at the same tribunal or at another tribunal connected with it by reason of appeal, the function of advocate or procurator, whether directly or through an intermediate person." Therefore, a petitioner cannot appoint any tribunal minister for the function of procurator, unless the tribunal minister has the sole function of being a procurator; this procurator would already be on the list of approved procurators according to canon 1490.<sup>23</sup>

The law does not provide further information as to whether the procurator can be appointed in the context of the pastoral inquiry, prior to the submission of the *petitio*, in the context of the citation or at any other stage of the process. This means, a petitioner could already appoint a procurator before the process begins. Furthermore, canon 1482 allows for the petitioner to appoint one procurator only.<sup>24</sup> "§1. A person can appoint only one procurator who cannot substitute another unless the procurator has been given the expressed faculty to do so. §2. If a person appoints several procurators for a just cause, however, they

<sup>22</sup> J.P. BEAL, "Making Connections: Procedural Law and Substantive Justice," in *Jur*, 54 (1994) (= J.P. BEAL, "Making Connections"), 154.

<sup>23</sup> See P. HALLEIN, "L'interdiction du cumul de l'office du défenseur du lien avec d'autres offices et charges dans le tribunal ecclésiastique. Étude comparative entre le Code et l'Instruction *Dignitas connubii*," in *StC*, 44 (2010), 437-438; see LÜDICKE and JENKINS, *Dignitas Connubii*, 81-82.

<sup>24</sup> Cf. DC 103: "§ 1. The parties can name a procurator separate from the advocate. § 2. Each person can name only one procurator for himself, who cannot appoint another in his place unless the express faculty has been given to him to do so (can. 1482 § 1). § 3. If, however, for a just cause, several have been appointed by the same person, they are to be so designated that prevention is operative among them (can. 1482 § 2)."

are to be designated in such a way that prevention is operative among them.” Since a procurator acts on behalf of the one who mandated him or her, it is reasonable to assume that a petitioner can appoint one procurator only.<sup>25</sup> The exception mentioned in canon 1482 §2 appears to be a rare scenario and not necessarily reasonable for marriage cases. It might be justifiable, especially in ordinary contentious trials or other procedures, if circumstances warrant the use of multiple, carefully mandated procurators.

The appointment of a procurator is done by mandate, which is necessary for a procurator to act on behalf of the petitioner.<sup>26</sup>

Canon 1484 §1. Before the procurator and advocate undertake their function, they must present an authentic mandate to the tribunal.

§2. To prevent the extinction of a right, however, the judge can admit a procurator even if the mandate has not been presented, once a suitable guarantee has been furnished if the case warrants it; the act, however, lacks any force if the procurator does not correctly present the mandate within the peremptory time established by the judge.

The mere reception of a mandate from the petitioner does not *per se* allow the procurator to place acts on behalf of the petitioner. Canon 1484 §1 indicates a two-step procedure: the petitioner authorizes/mandates a procurator, and this mandate,<sup>27</sup> which the procurator must accept, is to be presented to the tribunal. Therefore, the mandate cannot remain in the private forum between petitioner and procurator, but it must be made known to the tribunal by presenting an authentic mandate.<sup>28</sup>

<sup>25</sup> See GULLO and GULLO, *Nullità del matrimonio*, 55. Furthermore, if both parties seek a declaration of nullity of marriage, DC 102 can be applied: “If both parties are seeking a declaration of the nullity of the marriage, they can name for themselves a common procurator or advocate.” With the changes in procedural law due to *Mitis Iudex Dominus Iesus* that permits an abbreviated process before the bishop, the provision of art. 102 becomes more relevant. See *ibid.*, 59.

<sup>26</sup> See also DC 106 §1: “Before a procurator and advocate can take up their function, they must deposit an authentic mandate at the tribunal (can. 1484 §1). §2. Nonetheless, in order to prevent the extinction of a right, the *praeses* can admit a procurator even before the mandate has been exhibited, with a suitable guarantee having been offered, if the matter so warrants; any act lacks force, however, if the procurator does not properly present an authentic mandate within the peremptory time limit to be set by the same *praeses* (cf. can. 1484 §2).” See also GULLO and GULLO, *Nullità del matrimonio*, 60.

<sup>27</sup> See *ibid.*, 58: “In primo luogo, ci sembra di poter affermare con sufficiente sicurezza che il conferimento del mandato si configura come *contratto di prestazione d’opera*, quindi con i diritti e doveri (...) tipici di ogni contratto.”

<sup>28</sup> See PINTO, *I processi*, 203: “Il mandato autentico di procura *ad lites* è essenziale per evitare la nullità insanabile della sentenza secondo il can. 1620, n° 6. Esso deve essere speciale per la causa, e non generale per tutti i negozi giuridici del mandante.”

What follows from the right of the petitioner to appoint a procurator is the tribunal's obligation not only to inform the petitioner of this right, but also to provide an explanation of who can be a procurator, what is a procurator, how to appoint a procurator, how to remove a procurator, etc. In addition, the tribunal must give a petitioner the option to appoint any person of his or her choice who fulfills the requirements of canon 1483, or to freely select an already approved procurator from a list, as per canon 1490. Furthermore, the tribunal must provide the petitioner with a mandate form and give information on "special mandates," according to canon 1485.<sup>29</sup> All this should be done in the context of the pastoral inquiry prior to the submission of the *petitio*, since the law allows the petitioner to exercise his or her rights by permitting the procurator to submit the *libellus*. Failure to do so should be addressed by the defender of the bond and, if involved, by the petitioner's advocate. In this context, the failure to permit a petitioner to exercise his or her right to allow a procurator to submit a *petitio* can be considered illicit, but it does not rise to the level of invalidity and, therefore, may not give rise to a complaint of nullity of the sentence as per canon 1620, 7°: "A sentence suffers from the defect of irremediable nullity if: 7° the right of defense was denied to one or the other party."<sup>30</sup> Applying canon 18 on strict interpretation, to bring an action in a trial in form of a *petitio* is not a "right of defense."

Can the procurator's mandate be given orally? Although the law is silent on this issue, one can assume that it cannot be given *per se* orally since the procurator needs to produce the mandate to the tribunal.<sup>31</sup> As an exception, it could be given orally in the presence of the notary, if the notary makes a written, authenticated transcript and has it signed by the petitioner, the procurator, and the notary.

An exception to the requirement that a procurator produce a legitimate mandate to the tribunal prior to acting on behalf of the petitioner can be

<sup>29</sup> See *ibid.*, 204: "Si tratta: a) Della rinunzia all'azione, alla istanza o agli atti giudiziali; b) Della stipulazione di transazioni, patti e compromessi arbitrari; c) Di tutti gli per i quali il diritto richiede un mandato speciale; d) Della rinunzia all'appello, che non è esplicitata nel canone, perché implicata nella prima figura, e cioè la rinunzia all'azione." See also GULLO and GULLO, *Nullità del matrimonio*, 60-61.

<sup>30</sup> See also DC 101 "§1. Without prejudice to the right of the parties to defend themselves personally, the tribunal is bound by the obligation to provide that each spouse is able to defend his rights with the help of a competent person, most especially when it concerns causes of a special difficulty." See also LÜDICKE and JENKINS, *Dignitas Connubii*, 183.

<sup>31</sup> The following canons refer to oral remarks the notary must put in writing: c. 1503 §2 (oral petition), c. 1507 §3 (both parties present themselves before the judge to pursue the case and the non-necessity for a citation), cc. 1561, 1567 §1, 1569 §1 and 1664 (examination of parties and witnesses), c. 1568 (make mention if oath was taken by witness), c. 1605 (present at oral debate and transcript of debate), c. 1630 §2 (oral appeal).

found in canon 1484 §2. “The judge can admit a procurator even if the mandate has not been presented, once a suitable guarantee has been furnished if the case warrants it.”<sup>32</sup> However, canon 1484 §2 is not applicable in the scope of this study, since the condition “to prevent the extinction of a right” does not apply in the context of the submission of a legitimate *petitio*. There is no time limit established by law between the possible pastoral inquiry and the presentation of a *petitio*; hence, there is nothing that prevents a petitioner from not proceeding immediately after the pastoral inquiry.

The mandate mentioned in canon 1484 is not a special mandate but rather a generic one that permits the procurator to place certain acts on behalf of the petitioner. In the context of the *petitio*, the law does not require a specific mandate, nor is it subject to canon 1485, which states:<sup>33</sup> “Without a special mandate, a procurator cannot validly renounce an action, an instance, or judicial acts nor come to an agreement, make a bargain, enter into arbitration, or in general do those things for which the law requires a special mandate.” A *petitio* is not a renunciation, agreement, bargain or arbitration, and canon 1504, 3° specifically permits a procurator to sign and present the *petitio* to the competent tribunal.

Although it might be rare, a judicial vicar can order a procurator who submits a *petitio* on behalf of the petitioner to secrecy,<sup>34</sup> according to *Dignitas connubii*, article 73 §3. “Whenever the nature of the cause or of the proofs is such that from the divulgation of the acts and proofs the reputation of others could suffer, an occasion could be given for disagreements, or a scandal or other inconveniences of this type could arise, the judge can bind the witnesses, experts, parties and their advocates or procurators to secrecy by a special oath or, as the case may be, at least a promise, without prejudice to artt. 159, 229-230 (cf. can. 1455 §3).” Similarly, article 104 §1 specifies that the procurator is bound “to protect the rights of the party and to keep the secret of office.” One may find the following distinction useful: article 104 §1 refers to the secret of office of a procurator, which refers to those procurators who are approved by the bishop moderator for the office as such, and who are found on the tribunal list of approved procurators as per canon 1490. Article 73 indicates that the judge can bind a procurator to secrecy by a special oath, in addition to the oath of office according to 104 §1,<sup>35</sup> or at least to a promise.

<sup>32</sup> See also PINTO, *I processi*, 203.

<sup>33</sup> See also DC 107: “§1. Unless he has a special mandate, a procurator cannot validly renounce an action, an instance, or judicial acts, nor in general do those things for which the law requires a special mandate (cf. can. 1485).”

<sup>34</sup> See LÜDICKE and JENKINS, *Dignitas Connubii*, 142-143.

<sup>35</sup> On the discipline of legal representatives see DC 111; see also LÜDICKE and JENKINS, *Dignitas Connubii*, 197-198.

The interpretation is permissible in that article 73 also refers to any other freely chosen procurator by a petitioner who is not approved by the bishop moderator for the office, and hence, does not hold an office. Therefore, this procurator can be bound to secrecy by a special oath, or at least a promise by the judge.

### 1.3 — Removal

If a petitioner has granted a legitimate mandate to a procurator, the petitioner has the right to revoke this mandate at any stage of the process. The law does not indicate that specific reasons are necessary, but for the removal itself to take effect, canon 1486 § 1 states that the procurator “must be informed; if the issue has already been joined, the judge and the opposing party must also be informed about the removal.”<sup>36</sup> While the judicial vicar does not have to be informed of the revocation of a procurator prior to the formulation of doubt,<sup>37</sup> it is strongly recommended that the petitioner do so. If a petitioner has presented an authentic mandate to the tribunal after the pastoral inquiry but prior to the submission of the *petitio* and revokes the mandate prior to the *petitio*, the procurator loses his or her office and cannot submit a *libellus* to the tribunal on behalf of the petitioner. If the procurator submits it despite the mandate being revoked, the *libellus* is to be rejected according to canon 1505 § 2, 2°: “If without doubt it is evident that the petitioner lacks legitimate personal standing in the trial.” In the context of canon 1505 § 2, 2°, the “petitioner” includes his or her procurator, who, due to the lack of an authentic mandate, does not have the right to stand in trial and cannot submit a *petitio* on behalf of someone else. The non-mandated “person” is disqualified to challenge the marriage of the petitioner according to canon 1674 § 1, 1°. Furthermore, according to *Dignitas connubii* article 111 § 3: “Whoever has harmed another by any act illegitimately placed, either maliciously or through negligence, is bound by the obligation to repair the harm (cf. can. 128).”

In addition to the petitioner’s right to remove a legitimately mandated procurator, canon 1487 states:<sup>38</sup> “For a grave cause, the judge either *ex officio* or at the request of the party can remove the procurator and the

<sup>36</sup> On the procedure to remove a procurator and the *lacuna legis* on a procurator terminating the mandate, see M. NOBEL, “Procedure to Remove a Procurator or an Advocate,” in *CLSAP*, 2012, 117-120.

<sup>37</sup> See PINTO, *I processi*, 204.

<sup>38</sup> Similarly, *DC* 109: “Both the procurator and the advocate can be rejected by the *praeses*, by a decree containing motives, either *ex officio* or at the instance of a party, but only for a grave cause (cf. can. 1487).” See also GULLO and GULLO, *Nullità del matrimonio*, 63-64.



advocate by decree.”<sup>39</sup> *Dignitas connubii*, article 109, permits the *praeses* to remove a procurator by decree for a grave cause.<sup>40</sup> This is a situation that may require harmonization between the law and the instruction. The law indicates “the judge”; the instruction refers to the *praeses*.

A twofold distinction is necessary:<sup>41</sup> the removal of a procurator *ex officio* prior to the formulation of doubt, and the removal after the formulation of doubt. In the first case, canon 1487 is the applicable norm, which refers to the judge’s competency to remove a legitimately appointed procurator *ex officio*. According to the changes in virtue of *Mitis Iudex*, the “judge” in canon 1487 is the judicial vicar, since he is the only judge involved in the marriage nullity process prior to the formulation of the doubt. *Dignitas connubii*, article 109, referring to the *praeses*, is inapplicable; a future instruction should address the discrepancy in the terminology.

The second case relates to the judicial vicar who decrees the formulation of doubt and determines which process is to be used, and, consequently, constitutes a process-specific tribunal. Only then is a *praeses* involved; in this second case there is no discrepancy in the terminology between the Code and *Dignitas connubii*. Nevertheless, a different problem can arise: not only is the *praeses*, if he is not the judicial vicar himself, initially bound by the judicial vicar’s determination of the grounds, but he is also bound by the

<sup>39</sup> See PINTO, *I processi*, 205, footnote 292: “Si ricorderà che la formula *gravi de causa* è più esigente dell’altra *iusta de causa*. In questo caso quest’ultima non basta. Cf. *Comm*, 10 (1978), 271, can. 97.”

<sup>40</sup> See LÜDICKE and JENKINS, *Dignitas Connubii*, 194-195.

<sup>41</sup> An additional problem arises from a common practice at many tribunals: the illegitimate appointment of a procurator *ex officio* by the judicial vicar for a respondent declared absent from trial. See BEAL, “Making Connections,” 154. The following four scenarios are possible. A) The judicial vicar appoints a procurator *ex officio* for the respondent declared absent from trial, but the respondent returns to the process prior to the formulation of doubt and i) accepts the appointed procurator, or ii) rejects this procurator; then the procurator must be removed by the judicial vicar, and the respondent can appoint his or her own procurator or proceed without one. B) The judicial vicar appoints a procurator *ex officio* for the respondent declared absent, but the *praeses* disagrees with the appointment and removes the appointed procurator—in this case, the respondent does not return to the process. C) The judicial vicar appoints a procurator *ex officio* for the respondent declared absent, but the respondent returns to the process after the formulation of doubt and i) the *praeses* has no objections, and the respondent accepts the appointed procurator; or ii) the *praeses* has no objections but the respondent rejects this procurator; then the procurator must be removed by the *praeses* and the respondent can appoint his or her own procurator or proceed without one. D) The *praeses* appoints a procurator *ex officio* for the respondent declared absent, but the respondent returns to the process and i) accepts the appointed procurator, or ii) rejects this procurator; then the procurator must be removed by the *praeses* and the respondent can appoint his or her own procurator or proceed without one.

judicial vicar's decision on who was approved to function as procurator, accepting the judicial vicar's assessment of the requirements and approval of the petitioner's procurator. If the *praeses* determines that the procurator approved by the judicial vicar does not fulfill the requirements according to canon 1483 and determines that the person is not in good standing, does that suffice as grave cause to remove *ex officio* a procurator? Would this also challenge the validity of the *petitio* and the process itself, if the *petitio* was submitted and signed by the procurator who is now deemed not to fulfill the requirements of canon 1483? Did the function and responsibilities of a *praeses* change after *Mitis Iudex*, in the sense that a *praeses* must accept all the decisions of the judicial vicar? As laudable as many procedural changes are, it appears that, in some instances, the *praeses* must proceed with a process for which important decisions were already made by the judicial vicar.

## 2 — What is a Legitimate *petitio*?

The notion of a legitimate *petitio* will be discussed in this section with regard to its requirements, content, and rejection. Outlining the concept of a legitimate *petitio* is necessary to determine the circumstances under which a procurator can challenge the validity of a marriage on behalf of a petitioner.

### 2.1 — Distinction between *petitio* and *libellus*

Canon 1501 states: "A judge cannot adjudicate a case unless the party concerned or the promoter of justice has presented a petition according to the norm of the canons." Therefore, a judge has no competency to challenge any marriage to obtain a declaration of nullity without a qualified person expressing this desire; if a judge were to proceed on his own, the process would be irremediably null according to canon 1620, 4°: "the trial took place without the judicial petition mentioned in can. 1501 or was not instituted against some respondent."<sup>42</sup> Anyone other than the spouses or, if circumstances warrant it,

<sup>42</sup> See also L. ROBITAILLE, "Through the Lens of *Dignitas Connubii*: The Judge's Active Role in Marriage Nullity Cases," in *StC*, 40 (2006), 146-147; see PINTO, *I processi*, 225: "Il canone [1501] esprime un principio generale, la cui formulazione nel codice, è nuova, ma la cui sostanza è antica sia nella dottrina che nella procedura. Il giudice non possiede, salvo eccezioni, come si vedrà, il *ius agendi vel excipiendi*; egli deve attenersi alle domande (*petita*) espresse dell'attore. La totale assenza di domanda giudiziale provoca la nullità insanabile della sentenza (can. 1620 n. 4)."

the promoter of justice, is disqualified<sup>43</sup> from petitioning according to canon 1674. § 1. The following are qualified to challenge a marriage: 1° the spouses; 2° the promoter of justice when nullity has already become public, if the convalidation of the marriage is not possible or expedient.” Similarly, *Dignitas connubii*, article 114, states: “A judge cannot hear a cause unless a petition has been proposed by one who in accordance with artt. 92-93 enjoys the right to challenge the marriage (cf. can. 1501).”

The term used in canon 1501 is *petitio proposita*, which can be interpreted in the context of marriage procedures as “to come forward with a specific intent to challenge a marriage;” the term used in canon 1674 is *impugnandum*, which is translated as “to challenge.” Therefore, to commence any procedure a *petitio* is necessary; without it, a judge cannot proceed. This is reaffirmed in canon 1620, 4°, stating that a judicial sentence is irremediably null if the trial took place without the judicial petition (*iudiciali petitione*). Therefore, to begin and to challenge the validity of a marriage, a *libellus* is not mandatory; what is mandatory is a *petitio*. This means, not every *petitio* is a *libellus*, but every *libellus* is a *petitio*. The law recognizes two variations of *petitio*: an oral *petitio* according to canon 1503, and a written *petitio* according to canon 1504, which is a *libellus*.<sup>44</sup>

With reference to canon 1501, there is no legal requirement that the petitioner must submit a written intent to challenge a marriage, but this intention can be expressed in one way or the other to the judge. The law permits the presentation of an oral *petitio* which, if accepted by the judicial vicar,<sup>45</sup> the notary must put in writing, according to canon 1503. “§1. The judge can accept an oral petition whenever the petitioner is impeded from presenting a libellus or the case is easily investigated and of lesser importance. §2. In either case, however, the judge is to order the notary to put the act into writing; the written record must be read to and approved by the petitioner and has all the legal effects of a libellus written by the petitioner.” *Dignitas connubii*, article 115 § 2 states: “An oral petition can be admitted, whenever the petitioner is impeded from presenting a *libellus*, in which case the Judicial Vicar is to order

<sup>43</sup> See c. 10: “Only those laws must be considered invalidating or disqualifying which expressly establish that an act is null or that a person is effected”; and c. 124 § 1: “For the validity of a juridic act it is required that the act is placed by a qualified person and includes those things which essentially constitute the act itself as well as the formalities and requirements imposed by law for the validity of the act.”

<sup>44</sup> See PINTO, *I processi*, 226.

<sup>45</sup> See *ibid.*, 228: “Il Codice sembra esigere la *scrittura* per il libello, avendo ristretto la domanda *orale* a duo soli casi: se l'attore sia impedito fisicamente o psichicamente, oppure la causa sia di facile esame e di poca importanza. In questo caso il notaio del tribunale deve verbalizzare con cura il tutto, facendolo leggere o ascoltare e approvare dall'interessato.”

the notary to draw up the act in writing, which is then to be read to the petitioner to be approved, and which then takes the place of a *libellus* written by the petitioner, for all legal effects (cf. can. 1503)."

Can the oral *petitio* be submitted by a legitimately appointed procurator? The answer appears to be negative. The law refers only to the written *libellus* which can be signed and/or presented by a procurator. Furthermore, although a petitioner has appointed a procurator, it does not exclude the party from personally presenting the *libellus* to the judge. Later in this study, the applicability of the prescript of canon 1477 will be discussed. ("Even if the petitioner or respondent has appointed a procurator or advocate, they themselves are nevertheless always bound to be present at the trial according to the prescript of the law or of the judge"—will be discussed later in this study.)<sup>46</sup> Therefore, the judicial vicar will insist on the petitioner personally presenting the oral *petitio*. For validity, the *petitio* must be read to and approved by the petitioner. The law does not indicate who must read this transcript to the petitioner or who has to receive the "approval."<sup>47</sup> One can assume that it is the intent of the legislator that this "approval" be given at least in the presence of the notary who has read the transcript of the *petitio* to the petitioner, and the notary incorporates the written "approval" in the acts of the case.<sup>48</sup> Therefore, if the transcript of an oral *petitio* is only handed to the petitioner to read and sign, does that violate the concept of canon 1503? Not necessarily, because it is now outside the scope of an oral *petitio*, and it becomes a *libellus*, a formal written *petitio*.

## 2.2 — Content

Although canon 1503 permits an oral *petitio*, according to canon 1502: "A person who wishes to bring another to trial must present to a competent

<sup>46</sup> Similarly, *DC* 96.

<sup>47</sup> With regard to c. 1503 § 1, the legislator's intent is most likely that, if the judicial vicar approves, the petitioner presents an oral *petitio* to him, e.g., explains verbally his or her intentions to the judge, while the notary makes a transcript. It could be the judicial vicar or the notary who reads the transcript of the petitioner's oral *petitio*, and it could be the judge or the notary who receives the approval, in whatever form deemed sufficient. Interestingly, and applying c. 18 (strict interpretation), it only allows for the judge or notary to read the *petitio* to the petitioner, who has to approve it. Only then does the oral *petitio* have all the legal effects of a *libellus* written by a petitioner.

<sup>48</sup> See LÜDICKE and JENKINS, *Dignitas Connubii*, 206: "The written record of the orally presented petition must be authenticated by the petitioner as corresponding to his or her request for the intervention of the tribunal. Thus, the written form of the petition is to be read to the petitioner. The petitioner does not have to sign the written petition, but he or she must approve of it (*probandus est*). This can take place orally, with the notary indicating that approval was given."

judge a *libellus* which sets forth the object of the controversy and requests the services of the judge.” *Dignitas connubii*, article 115 § 1, reads: “One who wishes to challenge a marriage must present a *libellus* to a competent tribunal (cf. can. 1502).” To challenge a marriage, the *libellus* must contain certain elements, as per canon 1504:<sup>49</sup>

The libellus, which introduces litigation, must:

- 1° express the judge before whom the case is introduced, what is being sought and by whom it is being sought;
- 2° indicate the right upon which the petitioner bases the case and, at least generally, the facts and proofs which will prove the allegations;
- 3° be signed by the petitioner or the petitioner’s procurator, indicating the day, month, and year, and the address where the petitioner or procurator lives or where they say they reside for the purpose of receiving the acts;
- 4° indicate the domicile or quasi-domicile of the respondent.

*Dignitas connubii*, article 117, states: “If proof through documents is being proposed, these, inasmuch as possible, are to be submitted with the petition; if, however, proof through witnesses is being proposed, their names

<sup>49</sup> See also DC 116: “§ 1. A *libellus* by which a cause is introduced must:

- 1° express the tribunal before which the cause is to be introduced;
- 2° describe the object of the cause, that is, specify the marriage in question, present a petition for a declaration of nullity, and propose—although not necessarily in technical terms—the reason for petitioning, that is, the ground or grounds of nullity on which the marriage is being challenged;
- 3° indicate at least in a general way the facts and proofs on which the petitioner is relying in order to demonstrate what is being asserted;
- 4° be signed by the petitioner or his procurator, indicating also the day, month and year, as well as the place in which the petitioner or his advocate live, or declare they reside for the purpose of receiving acts;
- 5° indicate the domicile or quasi-domicile of the other spouse (cf. can. 1504).

§ 2. There should be attached to the *libellus* an authentic copy of the marriage certificate and, if need be, a document of the civil status of the parties.

§ 3. It is not permissible to require expert reports at the time when the petition is being exhibited.” In addition to the requirements as indicated in c. 1504, the Instruction indicates that the reason for petitioning does not need to be proposed in technical terms, and, therefore, it is not necessary that the petitioner propose at this stage ground(s) for the possible process. Furthermore, additional documents need to be submitted together with or already prior to the *libellus*. Doyle indicates: “The extent to which the *causa petendi* needs to be specified depends on the type of claim the petitioner is making. Marriage nullity cases generally do not require the petitioner to specify the *caput nullitatis*; indeed, there ought to be no expectation by the court that the petitioner actually propose a specific *caput nullitatis*, since most of the faithful are unfamiliar with the technical language in which marriage nullity *capita* are discussed and defined. In these cases, the judge takes into account the facts and proofs offered by the petitioner in the *libellus* and proposes a *caput nullitatis* to the parties at the citation of the respondent.” S.T. DOYLE, “The *Libellus*: Rejection and Recourse,” in *Jur*, 73 (2013), 379 (= DOYLE, “The *Libellus*”).

and domicile are to be indicated. If other proofs are being proposed, there should be indicated, at least in general, the facts or indications from which they are to be brought to light. Nothing however prevents further proofs of any kind from being brought forth in the course of the trial.” Doyle comments that the “petitioner must include two fundamental elements in the *libellus*: the explanation of the case being proposed and the request for judicial intervention,” because “without these two elements there is no petition at all.”<sup>50</sup> He continues:<sup>51</sup>

The petitioner should formulate his *libellus* clearly and in an orderly fashion, so that the judge can make an accurate determination of the merits of the case. Further, the *libellus* must be brief. The *libellus* is not the place to make a detailed presentation of the case or to present proofs, at least in the formal contentious process. Contradiction, obscurity, uncertainty, and weaving speech must be excluded from a *libellus*. Nevertheless, should the essential elements of the *libellus* be present (...), the judge may validly (although perhaps not licitly) admit the *libellus*.

### 2.3 — Acceptance or Rejection

Canon 1505 states:<sup>52</sup>

- §1. When a single judge or the president of a collegiate tribunal has seen that the matter is within his competence and the petitioner does not lack legitimate personal standing in the trial, he must accept or reject the *libellus* as soon as possible by decree.
- §2. A *libellus* can be rejected only:
  - 1° if the judge or tribunal is incompetent;
  - 2° if without doubt it is evident that the petitioner lacks legitimate personal standing in the trial;
  - 3° if the prescripts of can. 1504, nn. 1-3 have not been observed;
  - 4° if it is certainly clear from the *libellus* itself that the petition lacks any basis and that there is no possibility that any such basis will appear through a process.
- §3. If the *libellus* has been rejected because of defects which can be corrected, the petitioner can resubmit a new, correctly prepared *libellus* to the same judge.
- §4. A party is always free within ten available days to make recourse with substantiating reasons against the rejection of a *libellus* either to the

<sup>50</sup> Ibid., 373. Pinto also recognizes two main elements of a *libellus*: the “*elementi soggettivi*” and the “*elementi oggettivi*.” PINTO, *I processi*, 229, footnote 322.

<sup>51</sup> DOYLE, “The *Libellus*,” 374.

<sup>52</sup> See also DC 116 and 121.

appellate tribunal or to the college if the libellus was rejected by the presiding judge; the question of the rejection is to be decided as promptly as possible (*expeditissime*).

This means, once the *libellus* has been submitted,<sup>53</sup> there are two main reasons to reject it. The first reason is a deficiency that cannot be corrected according to canon 1505 §2, 1°, 2°, 4°. If the judge or tribunal approached is incompetent,<sup>54</sup> the petitioner needs to address the *libellus* to a judge or tribunal competent to act, which means that, in itself, the *libellus* may fulfill all requirements as per canon 1505 §2, 2°-4°, but it was addressed to an incompetent tribunal or judge. A petitioner may lack legitimate personal standing in trial.<sup>55</sup> Unlike any other reason to reject the petition, the lack of personal standing in trial must be established beyond doubt. To respect the interest of a petitioner who, for example, lacks the use of reason, a curator can act on behalf of the person.<sup>56</sup> This means that a new *libellus* is prepared and signed by the curator. A petition may also lack any basis and it cannot be assumed that any basis will be discovered during the process,<sup>57</sup> for example, “the petitioner asserts that the man was both sterile and impotent, but the facts also show that the spouses had children, and that the man is the father of them by natural means. Another example: the petition alleges nullity of

<sup>53</sup> See PINTO, *I processi*, 234-235. “Nella presentazione del libello entrano in gioco due principi: uno è quello della garanzie fondamentali, giurisdizionali del fedele, per cui deve facilitarsi l’accesso alla amministrazione della giustizia; l’altro è il conflitto, che, di per sé, suppone l’instaurazione di un giudizio, e che è da presumere facilmente ammissibile nell’ordinato svolgimento della vita giuridico-sociale.”

<sup>54</sup> See DOYLE, “The *Libellus*,” 386-389.

<sup>55</sup> See *ibid.*, 389-392; see also M. NOBEL, “*Persona standi in iudicio*,” 179-181; and PINTO, *I processi*, 235, footnote 335: “Il codice non conosce espressioni come *capacità processuale* o *legittimazione processuale*. Ha preferito tenersi a formule romanistiche, quali: *in iudicio agere, stare in iudicio, legitima persona standi in iudicio* (per es. cann. 1505-1506). La dottrina ... distingue tra: - *capacità di essere parte*, congruenza a sua volta della *capacità giuridica*; - *capacità processuale*, dagli Autori altrimenti chiamata *legitimatō ad processum*; - *legittimazione processuale*, dal F. Roberti (...) chiamata *legitimatō ad causam*, e può essere attiva (*agere*) o passiva (*respondere*).”

<sup>56</sup> If there is no curator who can act on behalf of the petitioner, the party cannot proceed with a trial. On the appointment of a guardian or curator, c. 98 §2 reads: “In what pertains to the appointment of guardians and their authority, the prescripts of civil law are to be observed....” If it is proven beyond doubt that the person has no right to stand in trial and, due to a mental illness etc. the party is canonically equated with infants (c. 99), a clause found in c. 98 §2 could apply: “unless in certain cases the diocesan bishop, for a just cause, has decided to provide for the matter through the appointment of another guardian.” Therefore, if circumstances warrant it, the diocesan bishop could appoint a guardian who could act on behalf of the petitioner. The function of the guardian is similar to that of a procurator, and the question as to whether and how a guardian can submit a *petitio* on behalf of a petitioner is essentially the same as the topic of this study.

<sup>57</sup> See DOYLE, “The *Libellus*,” 394-399.

marriage due to the impediment of disparity of cult for which a dispensation had not been given. Yet the pre-matrimonial investigation clearly indicates that the baptismal certification of both parties were presented at that time.”<sup>58</sup>

The second reason for rejecting a *libellus* is a deficiency in the *libellus* that can be corrected (canon 1505 § 2, 3°).<sup>59</sup> Once corrected, the *libellus* can then be admitted (c. 1505 § 3). Strictly speaking, only a *libellus* that is not drawn up according to canon 1504, 1°-3° can be corrected and presented anew,<sup>60</sup> e.g., if the *libellus* does not indicate who is seeking what from whom, how proofs can be acquired,<sup>61</sup> the date, location, and petitioner’s signature. Canon 1676 § 1 reads: “After receiving the *libellus*, the judicial vicar, if he considers that it has some basis, admits it and, by a decree appended to the bottom of the *libellus* itself, is to order that a copy be communicated to the defender of the bond and, unless the *libellus* was signed by both parties, to the respondent, giving them a period of fifteen days to express their views on the petition.” *Dignitas connubii*, article 122, has a similar provision. The judicial vicar verifies the content of the *libellus* with regard to its basis, and, once satisfied, approves it.<sup>62</sup> According to canon 1676 § 1, a copy of the *libellus* is communicated to the defender of the bond for observations once the judge has admitted the *libellus*. *Dignitas connubii* has a different provision. According to article 119: “§ 1. The *praeses*, once he has seen both that the matter is within the competence of his tribunal and that the petitioner does not lack legitimate standing in the trial, must either admit or reject the *libellus* by his decree as soon as possible (cf. can. 1505 § 1). § 2. It is advisable that the *praeses* hear the defender of the bond first.” The instruction envisions that the judge hear the defender of the bond prior to admitting or rejecting the *libellus*.<sup>63</sup> If the judge cannot verify competence and the petitioner’s right to stand in trial, he has to institute a preliminary investigation according to *Dignitas connubii*, article 120 § 1.<sup>64</sup> In addition, article 120 § 2

<sup>58</sup> LÜDICKE and JENKINS, *Dignitas Connubii*, 218.

<sup>59</sup> See also DC 123; see PINTO, *I processi*, 236.

<sup>60</sup> See DOYLE, “The *Libellus*,” 392-394.

<sup>61</sup> One has to recall the prescript of c. 1529 that does not permit the judge to collect proofs prior to the formulation of doubt and, therefore, the judicial vicar cannot insist that the Petitioner must present in the *libellus* proof for the claim. See also *ibid.*, 380-381.

<sup>62</sup> See LÜDICKE and JENKINS, *Dignitas Connubii*, 218.

<sup>63</sup> See *ibid.*, 212. On the procedure and subsequent consequences of the admission or rejection of the *libellus*, see DOYLE, “The *Libellus*,” 383-386.

<sup>64</sup> According to Bamberg, in the context of the preliminary investigation according to DC 120, the judge only has to verify competency and the parties’ right to stand in trial: “Cela peut exiger des investigations préliminaires de la part du président. Mais elles devront se limiter à la question de la compétence du tribunal et de la capacité du demandeur d’ester en justice.” A. BAMBERG, *Procédures matrimoniales en droit canonique*, Paris, Éditions ellipses, 2011, 64.



reads: “In regard to the merits of the cause, he can only institute an investigation in order to admit or reject the *libellus*, if the *libellus* should seem to lack any basis whatsoever; he can do this only in order to see whether it could happen that some basis could appear from the process.”

### 3 — *Elements Necessary for a Procurator to Submit a libellus*

In general terms, the function of a procurator is representing his or her client and acting in the name of and for the party. “The procurator is the extended arm of the party and its spokesperson before and in court.”<sup>65</sup> A sentence of the Spanish Rota describes the function of a procurator.

More specifically, the procurator is a professional who performs the procedural activity of the party: In the relationship with the tribunal, the procurator receives its communications and makes follow-up requests, except for personal acts reserved to the party itself. In relation to the party, the procurator’s characteristic derives from the power granted through mandate... And in relation to the advocate, a procurator helps him by transmitting resolutions, translations, copies, writings, documents and, in general, everything that leads to the defense of the represented party, and also collecting from him what has to be presented to the tribunal.<sup>66</sup>

#### 3.1 — Can the Procurator Prepare the *libellus*?

The final question remains: in the context of the *petitio*, what can the procurator do? Canon 1504, 3° and *Dignitas connubii*, article 116, 4°, speak of *subscribi ab procuratore*, which means that the *libellus* is signed by the procurator. Neither text indicates who prepares the *libellus*, only who has to sign it. Furthermore, *Dignitas connubii*, article 104 §2, says *procuratoris libello tribunali exhibere*, which means the procurator “shows,” “delivers,” or “presents” the *libellus* to the tribunal. The term *exhibere* could also be interpreted as “to provide,” but not in the sense of actually writing the document.

<sup>65</sup> See VON WEBER, *Rechtsanwalt*, 103 (translation mine).

<sup>66</sup> “Más concretamente, el procurador es el profesional que realiza la actividad procesal de la parte: En la relación con el tribunal recibe sus comunicaciones y realiza las peticiones que proceden, salvo el derecho del poderdante a sus actos personales. En relación con la parte tiene lo característico dimanante del poder otorgado en cuanto contrato de mandato... Y en relación con el abogado le ayuda transmitiéndole resoluciones, traslados, copias, escritos, documentos y, en general, todo cuanto conduzca a la defensa del representado, y además recogiendo de él lo que haya que presentar al tribunal.” Quoted from VON WEBER, *Rechtsanwalt*, 104 (translation mine).

The law as well as the instruction appear to be silent on the issue of who must write the *libellus*, and whether a procurator can do this without the petitioner. It is common understanding that the procurator and petitioner should consult, but it is not a legal requirement. Therefore, a petitioner can discuss the *libellus* with the procurator and either person can transcribe and sign the *libellus*. Could a legitimately mandated procurator present a petition on behalf of a petitioner who does not want to be involved in the process, even with the risk that the procurator presents the alleged facts of the case himself or herself, with or without the knowledge of the petitioner?<sup>67</sup> Is the judge to be made aware of it? The requirement of canon 1477 that a petitioner be present at the trial does not apply since the trial has not yet begun; the litigation begins with the legitimate citation of the respondent according to canon 1512. It appears that the judicial vicar must verify a *libellus* submitted by a legitimately appointed procurator in the context of the preliminary investigation, according to *Dignitas connubii*, article 120.

§ 1. The *praeses* can and must, if the case requires, institute a preliminary investigation regarding the question of the tribunal's competence and of the petitioner's legitimate standing in the trial.

§ 2. In regard to the merits of the cause he can only institute an investigation in order to admit or reject the *libellus*, if the *libellus* should seem to lack any basis whatsoever; he can do this only in order to see whether it could happen that some basis could appear from the process.

The judicial vicar can determine the two elements stated in paragraph 1: the tribunal's competence and the petitioner's legitimate standing in the trial. Furthermore, according to paragraph 2, the judicial vicar must determine if a *libellus* has some reasonable basis and if this can somehow be proven within the process. The judicial vicar, who is most likely unaware of the details of the marriage in question,<sup>68</sup> cannot make a determination on the accuracy of the basis of the *libellus* if it is solely prepared by a legitimately mandated procurator, nor does the judicial vicar have any reason to question

<sup>67</sup> Although it appears strange that a legitimately appointed person can bring an action to trial without knowledge of the issue at hand, this concept is recognized in matrimonial procedural law: if the good of the Church is at risk, a promoter of justice can submit a *libellus* to have a marriage verified in which one or both of the spouses concerned are persons of public interest, etc. One can assume that in most instances the promoter of justice will have little to no knowledge of the marriage itself and would rely on third-party information. The difference with the problem outlined in this study is that the procurator did receive and accept a legitimate mandate from the petitioner who, by a positive act of the will, permits the procurator to act on his or her behalf; in contrast, the promoter of justice is not mandated by either of the spouses but acts on behalf of the Church.

<sup>68</sup> If the judicial vicar is involved with the object in question or the parties concerned, cc. 1447-1451 are to be observed.

whether the *libellus* was solely prepared by a legitimately mandated procurator simply because it was signed by the procurator.

### 3.2 — Expression of the Tribunal for the Cause

Canon 1504 and *Dignitas connubii*, article 116, refer to the elements necessary for a legitimate *libellus*. Which of these elements can be executed by a mandated procurator? The first element is:<sup>69</sup> “§ 1. A *libellus* by which a cause is introduced must: 1° express the tribunal before which the cause is to be introduced.” Since the petitioner submitted a legitimate mandate to the tribunal for the appointment of a procurator prior to the *petitio*, which the procurator has accepted, the same procurator can express in the *libellus* the same tribunal “before which the cause is to be introduced.” Could the procurator “create multiple *libelli* for multiple tribunals, one of which would then obtain competence through the rule of prevention, after it has accepted the *libellus* and cited the respondent before the others acted on the petition”<sup>70</sup>? The answer must be no; only a mandated procurator can submit a *libellus* on behalf of the petitioner, and it would be unreasonable for a petitioner to give a legitimate mandate to a procurator for each possible tribunal. The law does not prohibit a petitioner from presenting multiple *libelli* to different tribunals; the litigation begins pending when one tribunal has accepted the *libellus* and legitimately cites the respondent according to canon 1512.

### 3.3 — The Object of the Cause, the Ground(s) and Proofs to be Presented

The second and third elements of the *libellus* are that it must “2° describe the object of the cause, that is, specify the marriage in question, present a petition for a declaration of nullity, and propose—although not necessarily in technical terms—the reason for petitioning, that is, the ground or grounds of nullity on which the marriage is being challenged; 3° indicate at least in a general way the facts and proofs on which the petitioner is relying in order to demonstrate what is being asserted.” The procurator can briefly outline the facts of the marriage in question and indicate which proofs may be available and a reason for the failure of the marriage by proposing terms of nullity. One cannot presume that a procurator cannot have some knowledge of

<sup>69</sup> The author of this study quotes in this context DC 116; c. 1504 was presented in the previous section.

<sup>70</sup> DOYLE, “The *Libellus*,” 377.

the marriage either personally or as disclosed by the petitioner. As indicated above, it is difficult if not impossible for the judicial vicar to verify in the context of the preliminary investigation the authenticity and correctness of the claims in the *libellus*, nor is it part of the preliminary investigation according to *Dignitas connubii*, article 120. The correctness can be discovered only as the process develops. In the context of the acceptance or rejection of the *libellus*, the judicial vicar must rely on what is reasonably presented in the *libellus*, even if it is signed and submitted by a legitimately appointed procurator, which relates to the fourth element of the *libellus*, that it “4º be signed by the petitioner or his procurator, indicating also the day, month and year, as well as the place in which the petitioner or his advocate live, or declare they reside for the purpose of receiving acts.”

### *Conclusion*

The petitioner has a right to appoint a procurator who can place acts on behalf of the party, even prior to the *petitio*. The scope of competency of a legitimately authorized procurator is outlined in the mandate. Since the petitioner can appoint a procurator prior to the *petitio*, the petitioner needs to be made aware of this fact, most likely in the context of the pastoral inquiry.

The petitioner has two options in submitting a *petition*. If it is an oral petition, the petitioner has to personally bring it before the judicial vicar, and the notary has to prepare a transcript. If it is a *libellus* (a written *petitio*), it can be prepared and signed by the procurator alone. Usually the *libellus* will be prepared by the petitioner with the procurator, maybe even with the assistance of a duly mandated advocate. It appears superfluous to have specific regulations as to who puts the claim “on paper” and whether a petitioner needs to be physically in the presence of the procurator. It is most likely speculative in nature whether a procurator, who has first or second-hand knowledge of the marriage in question, prepares the *libellus* with only the consent of the petitioner. The judicial vicar has no means of clarifying who put the claim on paper, nor is it any canonical requirement or limitation as long as the *libellus* adheres to the prescripts of canon 1504.

Once a *libellus* is submitted, the judicial vicar examines the *petitio* and, according to the prescripts of canon 1504 and 1505, accepts or rejects it. The judicial vicar has no means to determine if a *petitio*, submitted and signed by a procurator, was prepared by the petitioner or the procurator, nor does he have to according to canon 1505. Even in case of doubt, the judicial vicar may not have any means to ask the petitioner to present himself before the

judge to seek the authenticity of the *petitio*. It is questionable whether the prescript of canon 1477 applies: “Even if the petitioner or respondent has appointed a procurator or advocate, they themselves are nevertheless always bound to be present at the trial according to the prescript of the law or of the judge.” The problem in the context of the submission of the *petitio* is that the trial has not begun. Furthermore, there does not seem to be any legal foundation in the context of *Dignitas connubii*, article 120, which refers to a preliminary investigation: the possibility that a procurator can prepare a *libellus* with the consent only of the petitioner, sign it, and submit it to the tribunal. The judicial vicar, at this stage of the procedure, cannot “conditionally” reject a *libellus* simply because the legitimately mandated procurator alone was responsible for the *libellus*, nor does the law have any mechanism in place that could either prevent such a scenario or give the judicial vicar some probative measures to guarantee that the *libellus* reflects the intentions of the petitioner. In short, if the claim outlined in the *libellus* appears probable, and the prescripts of canons 1504 and 1505 have been observed, it is canonically irrelevant who prepared the *libellus* or what knowledge may be possessed by the author; its verification and correctness will come to light during the process itself.

## L'OIKONOMIA ET LE CHAPITRE VIII DE L'EXHORTATION APOSTOLIQUE *AMORIS LAETITIA*

ROCH PAGÉ

**RÉSUMÉ** — L'exhortation apostolique du Pape François a suscité de nombreuses réactions, interprétations et commentaires variés de la part de conférences épiscopales, d'évêques et de canonistes. L'auteur se limite à l'étude du fameux chapitre VIII de l'exhortation qu'il analyse sous l'aspect de l'application de l'oikonomia, cette charité pastorale à laquelle le Pape a fait allusion à son retour des Journées Mondiales de la Jeunesse en 2013 en réponse à une question d'un journaliste concernant la situation des fidèles divorcés et remariés. Pour l'auteur, le chapitre VIII présente une importante évolution de la *mens legislatoris* au sujet du canon 915 sur l'admission—ou non—des fidèles qui « persistent avec obstination dans un péché grave et manifeste ». Il s'agit certainement d'une première ouverture vers l'admission de divorcés remariés sous certaines conditions à la pleine participation à la vie sacramentelle de l'Église.

**SUMMARY** — The apostolic exhortation of Pope Francis has elicited many reactions, interpretations, and varied comments from episcopal conferences, bishops, and canonists. The author limits himself to the study of the famous chapter VIII of the exhortation which he analyses under the aspect of the application of oikonomia, this pastoral charity to which the Pope alluded on his return from the World Youth Days in 2013 in response to a question from a journalist concerning the situation of divorced and remarried faithful. For the author, Chapter VIII presents an important evolution of the *mens legislatoris* regarding canon 915 on the admission—or not—of the faithful who “persist with obstinacy in a grave and manifest sin.” This is certainly a first opening towards the admission of divorced and remarried persons under certain conditions to full participation in the sacramental life of the Church.

## *Introduction*

Lorsqu'il promulgue une loi, le législateur a en vue le bien commun de la communauté dont il a la charge. Comme il ne peut tenir compte de toutes et chacune des situations particulières dans lesquelles certains de ses membres se trouvent, sa loi est nécessairement universelle. C'est pourquoi, « compte tenu des circonstances »<sup>1</sup> une dispense de l'application de certaines lois est possible par l'autorité compétente. Le législateur peut également inclure lui-même dans certaines lois des exceptions dont un fidèle peut se prévaloir à certaines conditions déterminées par le législateur lui-même. Nous pourrions mentionner également les privilèges et jusqu'à un certain point la convalidation de divers actes juridiques et la possibilité de suppléer au pouvoir exécutif de gouvernement dans certains cas d'erreur ou de doute<sup>2</sup>. Le fait que tous ces actes administratifs se trouvent dans le Code de droit canonique signifie que le législateur lui-même admet que sa loi peut être trop générale pour s'appliquer à tous et de manière égale dans toutes et chacune des situations.

En plus des dispenses, exceptions, privilèges et autres actes adoucissant la rigueur de la loi, il existe d'autres possibilités de parvenir à un résultat semblable soit par l'intervention de l'autorité compétente, judiciaire, exécutive ou pastorale, en vertu de l'équité ou de l'oikonomia, soit par l'individu lui-même recourant en conscience à l'épikie. Si les deux premiers concepts concernent le for externe, le troisième appartient davantage au for interne ou individuel dans la mesure où il ne nécessite pas l'intervention d'une autorité compétente pour son application. Cependant, ces trois concepts ont à divers degrés la loi comme champ commun d'application tout comme ils ont comme dénominateur commun la compréhension, l'indulgence ou, dans le cas de l'oikonomia, la miséricorde.

Même si la loi est à divers degrés le champ d'application de ces trois concepts, leur dénominateur commun étant une considération pour l'activité humaine, cela peut suffire pour les qualifier de « vertus ». En effet, l'équité concerne l'interprétation et l'application de la loi elle-même en accord avec la justice. Contrairement à l'oikonomia et à l'épikie, l'équité est la seule des trois « vertus » à être mentionnée dans le Code de droit canonique.

<sup>1</sup> Canon 90.

<sup>2</sup> Cf. c. 144 § 1.

## 1 — Notion de l'équité, de l'épikie et de l'oikonomia

Il sera question de l'oikonomia en relation avec le chapitre VIII de l'exhortation apostolique post-synodale du Pape François concernant les catholiques divorcés et vivant dans une autre union. Pour rendre compte de ce choix, il faut considérer d'abord brièvement l'équité et l'épikie et leur relation à la loi.

### 1.1 — L'équité

Suite au souhait du Synode des évêques de 1967 ayant approuvé les principes devant guider la révision du Code de 1917, le terme « équité » se retrouve mentionné sept fois dans le Code de 1983<sup>3</sup>, exprimé de diverses manières selon les contextes. Sans donner à chaque mention un sens précis, on y trouve : « équité » sans qualificatif, « équité naturelle » et « équité canonique ». Selon les contextes où se trouve sa mention, il est possible de déduire les divers éléments appartenant à la nature de l'équité, comme son but : favoriser la *cura animarum*; son lien avec la vertu de justice; sa source d'inspiration, c'est-à-dire la charité, la modération; sa portée dans la législation elle-même; et finalement l'étendue de son application lorsque la stricte observance de la loi n'est pas absolument nécessaire en vue du bien commun.

Voilà les éléments essentiels appartenant à la nature de l'équité dont la mention dans le Code signifie qu'elle doit toujours être appliquée par une autorité compétente dans un cas particulier en raison du caractère universel de la loi sans oublier que le bien commun en est la finalité. Pour ces raisons, Aristote considérerait l'équité comme un allègement de la loi et non comme son abrogation. Dans son discours à la Rote romaine en 1973, le Pape Paul VI rappelle la définition de l'équité donnée par Hostiensis comme étant « la justice tempérée par la douceur de la miséricorde »<sup>4</sup>. Plus loin dans la même allocution le Pape ajoute : « L'équité, que la tradition chrétienne a reçue de la jurisprudence romaine, donne au droit canonique la qualité de ses lois, la norme de leur application, une attitude d'esprit et d'âme qui tempère la rigueur du droit »<sup>5</sup>.

<sup>3</sup> Voir cc. 19; 221 § 2; 271 § 3; 686 § 3; 702 § 2; 1148 § 3 et 1752. Dans le Code de 1917 il s'y retrouvait six fois.

<sup>4</sup> PAUL VI, « L'équité dans le droit canonique », 8 février 1973, dans J. THORN, *Le pape s'adresse à la Rote*, Faculté de droit canonique, Université Saint-Paul, Ottawa, ON, 1994, 126.

<sup>5</sup> Ibid., 127.



## 1.2 — L'épikie

« L'épikie désigne étymologiquement le terme grec *ἐπιεικής*, et désigne ce qui est convenable, modéré, équitable »<sup>6</sup>. En d'autres termes, l'épikie réfère à la vertu de justice. Pour Aristote et saint Thomas d'Aquin, l'épikie consiste en une correction de la loi lorsque celle-ci ne peut s'appliquer à un cas particulier en raison de son caractère universel. En somme, pour Aristote et saint Thomas, l'épikie est très près de l'équité. Résumant la définition de l'épikie selon ses prédécesseurs, Suarez y ajoute un élément définitif avec une référence à l'esprit du législateur, signifiant par là que si le législateur connaissait les circonstances particulières dans lesquelles se trouve un sujet de sa loi, il ne l'obligerait pas à l'observer. L'addition de la *mens legislatoris* à la notion d'épikie allait être capitale en ce qui a trait à son évolution et à sa distinction de l'équité<sup>7</sup>. Sans parler de l'auteur de l'application de l'une et de l'autre qui est différent.

En effet, étant donné que l'équité est appliquée par une autorité compétente et l'épikie par le sujet lui-même de la loi, nous pouvons dire que l'équité appartient au for externe et l'épikie au for interne et seulement indirectement au for externe puisqu'elle permet à l'individu de poser un acte vérifiable extérieurement. L'individu qui a recours à l'épikie présume que le législateur ne l'obligerait pas à observer sa loi s'il connaissait les circonstances particulières dans lesquelles il se trouve, comme le roi David et ses compagnons lorsqu'ils ont mangé le pain sacré qui était réservé aux prêtres<sup>8</sup>.

Le recours à l'épikie relevant du for interne ou de la conscience du sujet de la loi comme une excuse pour ne pas observer celle-ci dans un cas particulier toujours, l'on comprend pourquoi aucune mention ne s'en trouve dans le Code; en somme, il s'agit davantage de l'exercice d'une vertu que d'un acte juridique permis par une autorité compétente. Cela dit, étant donné que l'épikie tient compte de la pensée du législateur en présumant sa permission, elle est implicitement présente dans le Code, le canon 17 mentionnant le recours à la pensée du législateur en interprétant une loi « si le sens demeure douteux et obscur ». Évidemment, l'épikie s'applique lorsque la loi est clairement connue et qu'elle doit être observée en principe. Mais le recours à l'esprit du législateur ne concerne pas les mots eux-mêmes de la loi à être clarifiée mais l'intention du législateur qui n'urgerait pas son application s'il connaissait les circonstances particulières où se trouve le sujet de sa loi. En d'autres termes, la finalité de sa loi ne serait pas atteinte dans ces circonstances.

<sup>6</sup> A. VAN HOVE, *De legibus*, 278. Cité par Ch. LEFEBVRE, art. « Épikie », dans *DDC*, tome V, col. 364.

<sup>7</sup> Ibid., 365-366.

<sup>8</sup> Voir 1 Sam. 21, 7 et Mt 12, 4.

### 1.3 — L'oikonomia

Le terme *οικονομία* ou *εικονομία*, vient du grec *εικων*, icône ou image. Les Églises orthodoxes admettent en général que l'économie ecclésiale est une image de « l'économie et de la philanthropie de Dieu »<sup>9</sup>, c'est-à-dire une icône de sa miséricorde.

Quelques mois après son élection au pontificat suprême, le Pape François s'est rendu au Brésil pour les vingt-huitièmes Journées Mondiales de la Jeunesse. Pendant son vol de retour, il a donné une conférence de presse au cours de laquelle lui fut posée une question au sujet de l'attitude de l'Église envers les catholiques divorcés et remariés : « Très saint Père, pendant cette visite vous avez parlé souvent de miséricorde. Concernant la réception des sacrements par les fidèles divorcés et remariés, est-ce possible que la discipline de l'Église change, que les sacrements puissent être une occasion de rapprocher ces gens plutôt que de poser une barrière les séparant des autres fidèles ? »<sup>10</sup>.

Comme le journaliste faisait référence à la miséricorde dans sa question, le Pape François a commencé sa réponse en disant : « La miséricorde est une réalité beaucoup plus large que le cas que vous soulevez ». Puis il ajouta : « Si le Seigneur ne se lasse pas de pardonner, nous n'avons pas d'autre choix que de prendre soin de ceux qui souffrent ». Étant donné que cette question sera discutée lors du prochain synode sur la famille, le Pape ne répondit pas directement, mais il ouvrit lui-même une parenthèse immédiatement après avoir mentionné la « pastorale du mariage » pour dire : « Les Orthodoxes ont une pratique différente. Ils suivent la théologie de l'économie—oikonomia—comme ils l'appellent et donnent une seconde chance en la permettant [c'est-à-dire la communion] ». Puis il conclut en disant : « Je crois que ce problème, et je ferme la parenthèse, doit être étudié dans le cadre de la pastorale du mariage ». Il est à noter qu'il n'a pas dit : dans le cadre de la révision du Code de droit canonique, signifiant par là que l'oikonomia appartient d'abord à l'exercice du ministère pastoral et n'est pas reliée directement au droit canonique comme l'est l'équité.

De plus, tel qu'évoqué par le Pape François, l'oikonomia appartient à la pratique pastorale des Églises orthodoxes. Et comme elle concerne la miséricorde, comme nous allons le voir, l'oikonomia n'est pas étrangère à la

<sup>9</sup> Voir ATHENAGORAS (PECKSTADT) OF SINOPE, « Marriage, Divorce and Remarriage in the Orthodox Church: Economia and Pastoral Guidance », [http://www.orthodoxresearchinstitute.org/articles/liturgics/athenagoras\\_remarriage.htm](http://www.orthodoxresearchinstitute.org/articles/liturgics/athenagoras_remarriage.htm)

<sup>10</sup> Pape FRANÇOIS, « World Youth Day 2013 : Inflight Press Conference », dans *Origins*, 43/13 (2013), 204. Notre traduction.

pratique pastorale de l'Église latine, même si le terme n'existe pas dans son vocabulaire théologique. Ceci est vrai également en ce qui concerne les Églises catholiques orientales : le terme ne se trouve pas dans le *Code des canons des Églises orientales*.

Le principe de l'oikonomia appliqué au mariage vient des Églises orthodoxes et est surtout connu quant à son application aux nouvelles unions après un divorce. Ceci est fort probablement cette application à laquelle le Pape François pensait dans sa réponse au journaliste tel que cité plus haut. Mais la notion et l'application de l'oikonomia sont beaucoup plus larges. Cette notion était connue dans l'Église primitive, spécialement au quatrième siècle sous forme d'une exception à la rigueur de la loi<sup>11</sup>.

Fondamentalement, le principe d'économie concerne le salut des âmes. Ne parle-t-on pas de « l'économie du salut » ? Dans ce sens large, l'économie est un principe commun aux Églises orthodoxes et aux Églises catholiques, latines et orientales. Il appartient davantage à la vie pastorale de l'Église qu'à sa vie doctrinale ou juridique. Voilà pourquoi l'économie ne peut s'exercer sur des questions de foi ou de doctrine<sup>12</sup>. Voilà aussi pourquoi l'économie est une notion difficile à définir. La Commission préparatoire au code oriental a rejeté la proposition d'introduire dans le futur code un texte sur l'oikonomia en raison de l'impossibilité de circonscrire juridiquement cette notion, même si elle imprègne l'ensemble du code, l'économie étant une des dimensions fondamentales de la mission pastorale de l'Église, comme le code lui-même.

L'oikonomia a un contenu aussi riche que le pouvoir pastoral de l'Église. Elle est plus large qu'un code et peut donc inclure tous les remèdes appartenant à un code pour résoudre les situations qui peuvent être préjudiciables au salut des âmes<sup>13</sup>.

« Selon le sens originel du terme, l'économie est un moyen par lequel l'Église organise et accomplit sa mission en vertu de son pouvoir de lier et de délier qu'elle a reçu de Jésus-Christ, tout en considérant les circonstances de temps et de lieux ainsi que les besoins du peuple qu'elle doit conduire au salut<sup>14</sup>. L'application la plus connue de l'économie dans les Églises orthodoxes concerne la tolérance d'une nouvelle union à la suite d'un divorce. L'application de l'économie dans ce sens strict peut varier d'une Église

<sup>11</sup> Voir É. HADDAD, « L'économie dans les Églises orientales », dans *StC*, 28 (2004), 175.

<sup>12</sup> *Ibid.*, 173.

<sup>13</sup> Voir I. ZUZEK, « L'économie dans les travaux de la Commission préparatoire pour la révision du Code de droit canonique oriental », dans *Kanonika*, 8 (1997), 92. Traduction de l'auteur.

<sup>14</sup> G.D. GALLARO, « Oikonomia and Marriage Dissolution in the Christian East », dans *Logos: A Journal of Eastern Christian Studies*, 49/1-2 (2008), 44. Traduction de l'auteur.

orthodoxe à une autre, étant donné leur relative autonomie. C'est pourquoi il peut être inexact de dire simplement sans nuance : « les Orthodoxes font ceci ou cela ». Cependant, toutes croient et enseignent l'indissolubilité du mariage même si la plupart d'entre elles tolèrent le divorce et parlent d'une seconde union qui n'est pas un mariage sacramentel selon la majorité des auteurs. Comme le Pape François l'a dit : « c'est une seconde chance ».

La politique des Églises orthodoxes, avec lesquelles les Églises latines et orientales furent unies pendant plus d'un millénaire, repose sur une interprétation par certains Pères de l'Église des paroles du Christ dans les chapitres cinq et dix-neuf de Matthieu sur le divorce. Le Vicaire patriarcal des Grecs melchites catholiques d'Égypte, l'archevêque Elias Zoghby, dans une de ses nombreuses adresses aux Pères du Concile Vatican II, disait : « Pendant plusieurs siècles avant le Grand Schisme de 1054, les Églises orientales ont accepté cette interprétation et cette pratique à l'endroit de la partie innocente. L'Église romaine ne les a jamais condamnées tout au long des siècles pendant lesquels elles étaient unies, pas plus qu'elles ne le furent par les conciles œcuméniques présidés par le représentant de l'évêque de Rome<sup>15</sup>.

## 2 — *Application de l'équité, de l'épikie et de l'oikonomia*

Ayant un rapport à l'application de la loi en raison du caractère universel et conséquemment de la rigueur de celle-ci, l'équité, l'épikie et l'oikonomia n'ont pas toujours été aussi distinctes l'une de l'autre comme elles le sont maintenant. Cela dit tout en ayant gardé leur dénominateur commun, c'est-à-dire que les trois vertus s'appliquent à des personnes individuelles dans certaines circonstances qui ne pouvaient pas avoir été prévues par l'auteur de la loi. Cela signifie-t-il qu'elles sont inhérentes à la loi, au-dessus de la loi, ou au-delà ?

La question ne se pose pas pour l'équité au même degré que pour les deux autres actes, le législateur lui-même invitant explicitement le juge ou l'autorité compétente à agir avec équité dans ses décisions. Ce qui ne l'empêchera pas de l'appliquer en d'autres circonstances jugées « atténuantes ». Tout naturellement, l'équité est de mise lorsqu'il est question de régler un différent ou d'imposer une peine. Mais il ne faut pas oublier que le but du droit pénal tel qu'exprimé dans le canon 1341 est de « réparer le scandale, restaurer la justice et amender le coupable ». Cependant, en imposant une correction

<sup>15</sup> G.D. GALLARO, « Christian Oikonomia Revisited », dans *StC*, 48 (2014), 169 (= GALLARO, « Christian Oikonomia »). Notre traduction.

fraternelle ou une peine à un coupable, l'amendement de celui-ci ne doit pas se faire aux dépens de la réparation du scandale ni de la restauration de la justice. Ceci est vrai spécialement lorsque la loi mentionne une « juste pénalité » à être imposée par l'autorité compétente. Dans certains cas, l'équité peut aussi vouloir dire l'imposition d'une peine plus grave non seulement pour réparer le scandale causé par le délit mais pour ne pas causer un scandale d'un autre ordre en imposant une peine trop légère. Il est clair que l'équité est inhérente à la loi, soit explicitement soit implicitement<sup>16</sup>.

Tel que mentionné déjà, l'oikonomia n'appartient pas au vocabulaire juridique. C'est une notion beaucoup plus large qu'un code de droit. Appartenant au domaine de l'économie du salut, l'oikonomia est l'attitude d'un pasteur prenant en considération, entre autres, les conditions ou les circonstances particulières en vue de l'application des remèdes proposés ou imposés par la loi pour résoudre certaines situations qui pourraient être préjudiciables au salut des âmes. Ces remèdes sont, entre autres, les dispenses<sup>17</sup>, les exceptions<sup>18</sup>, la convalidation de divers actes juridiques<sup>19</sup>, la cessation des peines<sup>20</sup>, l'application du principe bien connu *ecclesia supplet*<sup>21</sup>. Il faut mentionner également les situations de danger de mort directement reliées au soin pastoral, situations dans lesquelles le droit divin prévaut sur le droit humain.

Ayant en vue le salut des âmes, l'oikonomia concerne au premier chef le « pouvoir des clés » confié non seulement à Pierre<sup>22</sup> mais également aux Douze<sup>23</sup> et donc à leurs successeurs, le collège des évêques. Ceux-ci sont donc les dépositaires des clés du Royaume. « Ces clés pouvant lier et délier, elles ne font pas que fermer mais elles peuvent aussi ouvrir »<sup>24</sup>. L'oikonomia peut être exercée non seulement par ceux qui ont reçu le pouvoir des clés mais par ceux qui ont reçu d'eux le soin des âmes, spécialement en ce qui a trait aux sacrements; par exemple, le baptême des enfants nés de parents mariés civilement ou en union libre, le baptême d'un enfant adopté par un couple de même sexe, etc. D'autres sacrements offrent

<sup>16</sup> Voir M.F. POMPEDDA, « L'equità nell'ordinamento canonico, » dans Sandro GHERRO et Giuseppe COMOTTI (dir.), *Studi sul Primo Libro del Codex Iuris Canonici*, Padoue, CEDAM, 1993, 7.

<sup>17</sup> Cc. 85-93.

<sup>18</sup> Par exemple, l'exception au principe de stabilité du curé, c. 522.

<sup>19</sup> Par exemple, la convalidation du mariage, cc. 1156-1165.

<sup>20</sup> Cc. 1354-1363.

<sup>21</sup> Voir c. 144.

<sup>22</sup> Mt., 16, 19.

<sup>23</sup> Mt., 18, 18.

<sup>24</sup> GALLARO, « Christian Oikonomia », 161.

des occasions d'appliquer l'oikonomia. Pensons au sacrement de pénitence. « Que le prêtre se souvienne, en entendant les confessions, que son rôle est à la fois celui d'un juge et celui d'un médecin, et qu'il a été institué par Dieu ministre à la fois de la justice et de la miséricorde divine, pour veiller à l'honneur de Dieu et au salut des âmes »<sup>25</sup>. De même, si l'application des peines avec équité appartient à l'autorité compétente, la rémission de certaines peines peut être faite par un confesseur au for interne sacramentel en vertu de l'oikonomia sous certaines conditions, par exemple : « s'il est dur au pénitent de demeurer dans un état de péché grave pendant le temps nécessaire pour que le Supérieur compétent y pourvoie »<sup>26</sup>. Nous nous demanderons plus loin si l'oikonomia s'applique également au sacrement de l'eucharistie et conséquemment, à la situation des fidèles divorcés et remariés.

Si l'équité appartient clairement au champ de la loi, qu'en est-il de l'oikonomia, qui n'appartient pas au domaine juridique en tant que tel? L'oikonomia peut être considérée comme la vertu du pasteur qui doit prendre des décisions impliquant des lois dont l'application rigide pourrait mettre en danger l'évolution spirituelle d'un fidèle. En d'autres termes, l'oikonomia est la vertu qui préside à l'application de « la loi suprême de l'Église »<sup>27</sup>, c'est-à-dire le salut des âmes. En ce sens, l'oikonomia se situe au-delà de la loi, qu'elle soit universelle ou particulière.

### 3 — *L'oikonomia et Amoris laetitia, Chapitre huit*

Étant directement en lien avec l'admission à la communion eucharistique des fidèles divorcés et vivant dans une autre union, le chapitre huit d'*Amoris laetitia*<sup>28</sup> peut être considéré comme une application pastorale du canon 915 qui statue que : « [...] ceux qui persistent avec obstination dans un péché grave et manifeste, ne soient pas admis à la sainte communion ».

<sup>25</sup> C. 978 § 1. Dans son exhortation apostolique *Amoris laetitia*, note 351, le Pape FRANÇOIS cite son exhortation apostolique *Evangelii gaudium* du 24 novembre 2013, n. 44, dans AAS, 105 (2013), 1038, pour rappeler aux « prêtres que le confessionnal ne doit pas être une salle de torture mais un lieu de la miséricorde du Seigneur ». Plus loin, il ajoute : « Je souligne également que l'Eucharistie n'est pas un prix destiné aux parfaits, mais un généreux remède et un aliment pour les faibles » (ibid., n. 47, p. 1039).

<sup>26</sup> C. 1357 § 1. Suivent certaines conditions, comme « l'obligation de recourir dans le délai d'un mois au Supérieur compétent [...] » (c. 1357 § 2).

<sup>27</sup> C. 1752.

<sup>28</sup> Pape FRANÇOIS, exhortation apostolique *Amoris laetitia*, 19 mars 2016, dans AAS, 108 (2016), 428-440.

*Amoris laetitia* n'est pas un texte législatif, pas plus que son chapitre huit ne peut être considéré comme une partie proprement normative du document. Cependant, ne peut-il pas être considéré dans l'ensemble et analogiquement, donc avec des ressemblances et des différences, comme un « décret général exécutoire » qui, selon le canon 32, détermine « les modalités d'application de la loi ou en urge l'application », ou encore comme une « instruction » qui, selon le canon 34, explique « les dispositions des lois et fixe leurs modalités d'application » ?

Comme *Amoris laetitia*, chapitre huit, n'est pas un texte législatif, il n'y a pas lieu d'appliquer l'équité de la part d'une autorité compétente. En outre, étant donné que l'admission à la sainte communion concerne le ministre de celle-ci, il n'y a pas lieu d'avoir recours à l'épikie de la part du fidèle concerné. Mais qu'en est-il de l'oikonomia ?

Concernant le salut des âmes, l'oikonomia est dans son sens large un principe commun aux Églises catholiques et orthodoxes. Dans son sens strict, elle est un principe pastoral appliqué dans la plupart des Églises orthodoxes à la tolérance d'une nouvelle union à la suite d'un divorce. Le Pape François parle d'une « seconde chance ». Considérant le *processus brevior* du motu proprio *Mitis iudex Dominus Jesus* impliquant comme juge « l'évêque lui-même en vertu de sa charge pastorale »<sup>29</sup>, considérant le chapitre huit dans son ensemble avec ses innombrables références au discernement pastoral des facteurs d'intégration et de miséricorde, et surtout, considérant la responsabilité qui revient aux pasteurs, *Amoris laetitia* représente un champ privilégié pour l'application de l'oikonomia.

Le Pape François est le législateur de la loi universelle, donc du Code lui-même qu'il n'a pas promulgué tout comme le Pape Benoît XVI l'était lorsqu'il a amendé certains canons promulgués par le Pape Jean-Paul II. Conséquemment, l'« intention du législateur » concernant le canon 915 entre autres est maintenant celle du Pape François. L'exhortation apostolique *Amoris laetitia* contient des affirmations qui illustrent un important changement dans la *mens legislatoris* en ce qui a trait au canon 915 et le statut des fidèles divorcés et vivant dans une autre union<sup>30</sup>.

<sup>29</sup> Pape FRANÇOIS, motu proprio *Mitis iudex Dominus Jesus*, 15 août 2015, AAS, 107 (2015), 960, n. IV.

<sup>30</sup> Le c. 915 ne mentionne pas explicitement que ces fidèles sont inclus parmi « ceux qui persistent avec obstination dans un péché grave et manifeste ». Cependant, pour les membres de la Commission de révision du Code, il était clair que le texte concerne les fidèles divorcés et remariés. Voir *Comm*, 15 (1983), 184. Voir aussi I. GRAMMUNT, « Non-Admission to Holy Communion: the Interpretation of Canon 915 (CIC) », dans *StC*, 35 (2001), 185 :

Le titre du chapitre VIII de son exhortation apostolique—*accompagner, discerner et intégrer la fragilité*—permet de suivre l'évolution de la pensée du législateur en ce qui a trait à son interprétation et à l'application du canon 915 par les pasteurs<sup>31</sup>.

### 3.1 — Accompagner qui ?

Si, selon le jugement d'un pasteur, certains fidèles ne doivent pas « être admis à la sainte communion », ceux-ci ne doivent pas être considérés comme excommuniés. Comme le Pape François l'affirme, « Ils participent à la vie de l'Église d'une manière incomplète ». Et il ajoute : « L'Église doit accompagner d'une manière attentionnée ses fils les plus fragiles, marqués par un amour blessé et égaré, en leur redonnant confiance et espérance, comme la lumière du phare d'un port ou d'un flambeau placé au milieu des gens pour éclairer ceux qui ont perdu leur chemin ou qui se trouvent au beau milieu de la tempête »<sup>32</sup>.

Le Pape parle de « gradualité dans la pastorale ». Ce faisant, il rappelle que « les Pères [du Synode] se sont également penchés sur la situation particulière d'un mariage seulement civil ou, toute proportion gardée, d'une pure cohabitation », notant que : « Quand l'union atteint une stabilité consistante à travers un lien public, elle est caractérisée par une affection profonde, confère des responsabilités à l'égard des enfants, donne la capacité de surmonter les épreuves et peut être considérée comme une occasion à accompagner dans le développement menant au sacrement du mariage »<sup>33</sup>.

Puis, parlant de ceux qui vivent dans une union civile ou une simple cohabitation, il souligne que « dans ces situations il sera possible de mettre en valeur ces signes d'amour qui, d'une manière ou d'une autre, reflètent l'amour de Dieu [...]. Il s'agit de les accueillir et de les accompagner avec patience et délicatesse »<sup>34</sup>.

« Ceci fut confirmé par JEAN-PAUL II dans l'exhortation apostolique *Reconciliatio et poenitentia*, du 2 décembre 1984 ».

<sup>31</sup> Pour une excellente présentation et un commentaire de *Amoris laetitia*, chapitre VIII, cf. J. BEAL, « When the Tribunal Is Not an Option, Is There Another? What Hath Francis Wrought? » dans *CLSAP*, 79 (2017), 48-60 (= BEAL, « When the Tribunal Is Not an Option »).

<sup>32</sup> N. 291.

<sup>33</sup> N. 293.

<sup>34</sup> N. 294.



### 3.2 — Discerner quoi ?

Tout d'abord, le Pape confie le discernement aux pasteurs qui, dans le contexte du document, sont les prêtres, qui « ont la mission d'accompagner les personnes intéressées sur la voie du discernement selon l'enseignement de l'Église et les orientations de l'évêque », mentionnant que « le colloque avec le prêtre, dans le for interne »<sup>35</sup>, concourt à la formation d'un jugement correct sur ce qui entrave la possibilité d'une participation plus entière à la vie de l'Église et sur les étapes à accomplir pour la favoriser et la faire grandir<sup>36</sup>.

Parlant de discernement, le saint Père insiste sur le besoin « d'éviter des jugements qui ne tiendraient pas compte de la complexité des diverses situations; il est également nécessaire d'être attentif à la façon dont les personnes vivent et souffrent à cause de leur condition »<sup>37</sup>.

« Personne ne peut être condamné pour toujours », dit-il, parce que ce n'est pas la logique de l'Évangile »<sup>38</sup>. En outre, « si l'on tient compte de l'innombrable diversité des situations concrètes, [...] on peut comprendre qu'on ne devait pas attendre du Synode ou de cette exhortation une nouvelle législation générale du genre canonique, applicable à tous les cas. Étant donné que le degré de responsabilité n'est pas le même dans tous les cas, les conséquences ou les effets d'une norme ne doivent pas nécessairement être toujours les mêmes »<sup>39</sup>. Le Pape avait sans doute en tête la vertu d'équité ou d'oikonomia.

En raison des « conditionnements et des circonstances atténuantes [...] il n'est plus possible de dire que tous ceux qui se trouvent dans une certaine situation dite 'irrégulière' vivent dans une situation de péché mortel, privés de la grâce sanctifiante »<sup>40</sup>. Et alors, quelqu'un qui ne vit pas dans un état de péché mortel peut-il, ou peut-elle recevoir la sainte communion? Le Pape François ne répond pas à cette question. Sans doute aurait-il fallu alors qu'il ouvre ou rouvre le débat sur la distinction à faire entre l'état de « péché grave et manifeste » du canon 915 et la conscience ou pas « d'être en état de péché grave » du canon 916.

Nous pourrions poursuivre sur le thème du discernement pastoral en tenant compte des circonstances atténuantes ayant conduit quelqu'un à divorcer ou

<sup>35</sup> Ceci n'est pas une référence à la « solution de for interne », « qui est un terme technique et canonique pour lequel un sens technique n'est généralement pas reçu en droit canonique » (BEAL, « When the Tribunal Is Not an Option », 39). Notre traduction.

<sup>36</sup> N. 300.

<sup>37</sup> N. 296.

<sup>38</sup> N. 297.

<sup>39</sup> N. 300.

<sup>40</sup> N. 301.

en considérant ceux ou celles qui, « ont parfois, en conscience, la certitude subjective que le mariage précédent, irrémédiablement détruit, n'avait jamais été valide »<sup>41</sup>. Quoi qu'il en soit, le Pape invite à ne pas cataloguer ou enfermer tous les cas « dans des affirmations trop rigides sans laisser place à un discernement personnel et pastoral approprié »<sup>42</sup>.

### 3.3 — Intégrer la faiblesse; jusqu'à quel point ?

Que signifie « intégrer la faiblesse » ? La réponse du saint Père est claire : « Il s'agit d'intégrer tout le monde, on doit aider chacun à trouver sa propre manière de faire partie de la communauté ecclésiale, pour qu'il se sente objet d'une miséricorde imméritée, inconditionnelle et gratuite »<sup>43</sup>.

Il importe de noter que nulle part dans ce chapitre ni ailleurs dans l'exhortation n'est mentionnée l'interdiction faite à ceux et celles qui se trouvent dans une situation conjugale irrégulière de recevoir l'absolution ou d'être admis à la communion eucharistique, comme Jean-Paul II l'affirme dans son exhortation apostolique *Familiaris consortio*<sup>44</sup>. Et pourtant, le Pape François cite le texte dans lequel son prédécesseur affirme que dans certaines situations irrégulières l'Église ne peut exiger que l'homme et la femme se séparent, par exemple en raison des enfants. Puis il ajoute : « L'Église, cependant, réaffirme sa discipline, fondée sur l'Écriture Sainte, selon laquelle elle ne peut admettre à la communion eucharistique les divorcés remariés »<sup>45</sup>. Le Pape François omet cette dernière phrase dans sa citation.

Comment ne pas croire que le Pape François a intentionnellement évité de mentionner cette interdiction telle que rappelée par le Pape Jean-Paul II ? Il n'est qu'à penser à ce que le Pape dit au sujet du discernement pastoral, au sujet des circonstances atténuantes et de la complexité des diverses situations, en plus du fait qu'il prévient que l'on ne doit pas attendre un ensemble de nouvelles règles de nature canonique applicables à tous les cas. Par-dessus tout, nous ne devons pas croire que tous les fidèles dans des situations irrégulières vivent en état de péché mortel et c'est pourquoi « ils ne doivent pas se sentir excommuniés »<sup>46</sup>.

<sup>41</sup> N. 298.

<sup>42</sup> Ibid.

<sup>43</sup> N. 297.

<sup>44</sup> JEAN-PAUL II, exhortation apostolique *Familiaris consortio*, 22 novembre 1981, dans AAS, 74 (1982), 81-191.

<sup>45</sup> N. 84.

<sup>46</sup> N. 299.

Selon les règles d'interprétation des normes du droit canonique, le canon 17 stipule que « les lois canoniques doivent être comprises selon le sens propre des mots dans le texte et le contexte ». Tout en tenant compte des nombreuses références à la conscience dans l'exhortation, il importe de considérer le canon 916 comme étant le contexte immédiat du canon précédent sur l'admission à la communion eucharistique : « Qui a conscience d'être en état de péché grave [...] ne communiera pas au Corps du Christ sans recourir auparavant à la confession sacramentelle ». Qu'en est-il alors du fidèle qui est conscient de ne pas être en état de péché grave après avoir lu *Amoris laetitia*, par exemple ?

La mention de la « gradualité dans la pastorale » signifie un mouvement vers une intégration complète de certains fidèles dans la vie de l'Église, en vertu du discernement au for interne de cas particuliers, en considérant que « les conséquences ou les effets d'une norme ne doivent pas nécessairement être toujours les mêmes ». Pour bien faire comprendre sa pensée, le Pape ajoute : « Pas davantage en ce qui concerne la discipline sacramentelle, étant donné que le discernement peut reconnaître que dans une situation particulière il n'y a pas de faute grave »<sup>47</sup>.

N'est-on pas en présence d'un important changement dans la *mens legislatoris* au sujet du canon 915 ? Ne peut-on pas y voir une invitation à s'abstenir d'une interprétation absolue du texte et de son application sans nuance à tous les fidèles divorcés ou vivant dans une autre union ? En d'autres termes, les fidèles divorcés et remariés ne persistent pas tous « avec obstination dans un péché grave et manifeste ».

Considérant seulement ces extraits parmi bien d'autres, n'y a-t-il pas lieu de parler d'une importante évolution de l'intention du législateur, invitant les pasteurs à appliquer le principe d'oikonomia en traitant des cas individuels ? Conséquemment, ne peut-on pas parler d'une éventuelle intégration dans la vie de l'Église incluant une pleine participation à sa vie sacramentelle ?

En ne mentionnant pas l'interdiction de recevoir l'absolution et la communion eucharistique dans tous les cas, le Pape ne mentionne pas davantage que la pleine participation à la vie sacramentelle de l'Église doit être nécessairement pour eux l'aboutissement du discernement pastoral de leur situation au for interne. Mais il ne le nie pas. Il remet cette responsabilité au pasteur qui doit prendre en compte les circonstances atténuantes, tout en les aidant à comprendre leur situation selon l'enseignement de l'Église et les

<sup>47</sup> N. 300, note de bas de page 336. Le Pape prend soin d'ajouter : « Ici, s'applique ce que j'ai affirmé dans un autre document » : cf. Exhortation apostolique *Evangelii gaudium*, 24 novembre 2013, nn. 44, 47, dans AAS, 105 (2013), 1038, 1040.

directives de l'évêque<sup>48</sup>. Selon les directives de l'évêque peut-être, mais la responsabilité dernière repose sur les épaules du pasteur au for interne, étant donné les circonstances atténuantes à considérer.

Même si on ne trouve aucune mention des conférences épiscopales dans le chapitre huit ni ailleurs dans l'exhortation, pour le Cardinal Francesco Coccopalmerio, alors président du Conseil pontifical pour les textes législatifs, « il va de soi que les autorités ecclésiastiques compétentes, c'est-à-dire les conférences épiscopales, devraient publier au plus tôt des lignes directrices visant à instruire les fidèles et leurs pasteurs à ce sujet »<sup>49</sup>. Est-ce si clair que les conférences épiscopales devraient intervenir ? Si tel est le cas, ce ne doit certes pas être par mode de décret général ou par une loi particulière ou une norme complémentaire.

Certaines conférences épiscopales l'ont fait<sup>50</sup>. D'autres regroupements d'évêques également. À ce sujet, l'intervention des évêques de la région pastorale de Buenos Aires, Argentine, est tout à fait digne de mention. Entre autres commentaires : « Si on arrive à reconnaître que, dans un cas concret, il y a des limites qui atténuent la responsabilité et la culpabilité, surtout quand une personne considère qu'elle tomberait dans une faute ultérieure en faisant du tort aux enfants de la nouvelle union, *Amoris Laetitia* ouvre une possibilité au sacrement de la réconciliation et de l'Eucharistie »<sup>51</sup>.

En accusant réception d'une copie de cette déclaration, le Pape François n'a pas seulement fait l'éloge de ses auteurs, mais il a endossé leur position en ces termes : « Cette lettre convient tout à fait. Elle explicite pleinement le sens du chapitre VIII d'*Amoris laetitia*. Il n'y a pas d'autre interprétation. Je suis certain que cela fera beaucoup de bien. Que le Seigneur vous accorde ses faveurs pour cet effort de charité pastorale »<sup>52</sup>.

De plus, il a ordonné la publication de la lettre de ses collègues argentins dans les *Acta Apostolicae Sedis* en même temps que sa lettre d'appréciation. À la fin de cette publication dans les *Acta*, le Cardinal Pietro Parolin, Secrétaire d'État, mentionne que le Pape François désire que l'interprétation des évêques argentins et sa lettre à leur intention appartiennent toutes deux au

<sup>48</sup> Voir n. 300.

<sup>49</sup> F. COCCOPALMERIO, *A Commentary on Chapter Eight of Amoris Laetitia*, Mahwah, N.J., Paulist Press, 2017, 26.

<sup>50</sup> Parmi celles-là, mentionnons la conférence épiscopale de Pologne, celles de Malte, d'Allemagne, de Belgique. Pour détails et référence aux sites web des conférences concernées, voir BEAL, « When the Tribunal Is Not an Option », note 79.

<sup>51</sup> AAS, 108 (2016), 1074.

<sup>52</sup> Ibid.

magistère authentique<sup>53</sup>, faisant à toutes fins pratiques de ces deux textes une addition à l'exhortation.

Cette décision inédite du Pape signifie-t-elle que toute interprétation de l'exhortation par un évêque diocésain ou par un groupe d'évêques devrait refléter ou être conforme à celle des évêques argentins ou recevoir une *recognitio* ou un genre de *nihil obstat* de la part du Saint-Siège ?<sup>54</sup> Tel que souligné par Beal, la publication d'une interprétation ou de lignes directrices par différentes autorités ecclésiastiques peut créer de l'inconsistance<sup>55</sup>. De plus, considérant « l'innombrable diversité des situations concrètes » mentionnée par le Pape, le danger est de développer ou de mettre en place « une nouvelle législation générale du genre canonique, applicable à tous les cas »<sup>56</sup>, ce que le Synode et le Pape François ont refusé explicitement de faire. Finalement, pourquoi le chapitre huit de l'exhortation *Amoris laetitia*, appliqué par les pasteurs en tenant compte des circonstances de chaque cas ne serait-elle pas considérée comme la ligne directrice pour une solution apportée au statut sacramentel des fidèles divorcés et remariés ou vivant dans une situation irrégulière ?

## Conclusion

Que ce soit en considérant l'équité, qui est inhérente à la loi comme un droit fondamental des fidèles, que ce soit l'épikie qui appartient au champ de la conscience et qui est au-delà de la loi, ou encore l'oikonomia, qui est une vertu du pasteur et qui est elle aussi au-delà de la loi, ces trois concepts sont reliés d'une manière ou d'une autre à la même vérité rappelée par Jésus aux Juifs : « Le sabbat a été fait pour l'homme, et non l'homme pour le sabbat »<sup>57</sup>.

<sup>53</sup> P. PAROLIN, Rescriptum « ex audientia SS.MI », 5 juin 2017 : « Summus Pontifex decernit ut duo Documenta quae praecedunt edantur per publicationem in situ electronico Vaticano et in Actis Apostolicae Sedis, velut Magisterium authenticum » dans AAS, id.

<sup>54</sup> Même si elle a été louangée et confirmée par le Pape François, trois évêques du Kazakhstan et quelques autres évêques, incluant l'ancien nonce apostolique aux États-Unis, l'archevêque Carlo Maria Viganò, se sont publiquement prononcés contre l'interprétation des évêques argentins et, conséquemment, contre celle du Pape François. Voir [www.lifenews.com/two-italian-bishops-join-kazakh-bishops-in-profession-of-truths](http://www.lifenews.com/two-italian-bishops-join-kazakh-bishops-in-profession-of-truths).

<sup>55</sup> Voir BEAL, « When the Tribunal Is Not an Option », 57.

<sup>56</sup> N. 300.

<sup>57</sup> Mc 2, 27.

Dans ses deux documents majeurs—*Mitis iudex Dominus Jesus* et *Amoris laetitia*—le Pape François nous offre un champ privilégié pour l'application de l'équité et de l'oikonomia. La première peut être considérée comme faisant partie d'une solution juridique à la question des fidèles divorcés et remariés et la seconde comme une solution pastorale à la même question. Cependant, la solution théologique demeure le chaînon manquant devant servir de support à ces deux solutions. Il n'est pas question ici de la théologie du mariage, qui est parfaitement résumée dans l'exhortation apostolique, mais de la théologie du pardon, qui s'appuie sur le pouvoir des clés remis non exclusivement à Pierre mais aux Douze et à leurs successeurs. En d'autres termes, l'Église exerce-t-elle pleinement le pouvoir de pardonner qu'elle a reçu de son fondateur comme faisant partie intégrale de sa mission ?

## **VADEMECUM ON CERTAIN POINTS OF PROCEDURE IN TREATING CASES OF SEXUAL ABUSE OF MINORS COMMITTED BY CLERICS: CANONICAL REFLECTIONS**

JOHN ANTHONY RENKEN

**SUMMARY** — The Congregation for the Doctrine of the Faith issued a *Vademecum* to assist ecclesiastical authorities and their collaborators in the preliminary investigation of allegations of sexual abuse of minors by clergy and on the penal processes (especially the extrajudicial penal process) which can follow. This study intends to offer some “canonical reflections” on aspects of the *Vademecum* which are of particular importance.

**RÉSUMÉ** — La Congrégation pour la Doctrine de la Foi a publié un *Vademecum* pour aider les autorités ecclésiastiques et leurs collaborateurs dans l'enquête préliminaire des allégations d'abus sexuels sur mineurs par le clergé et sur les processus pénaux (en particulier le processus pénal extrajudiciaire) qui peuvent suivre. Cette étude a pour but de proposer quelques « réflexions canoniques » sur des aspects du *Vademecum* qui sont particulièrement importants.

### ***Introduction***

The Congregation for the Doctrine of the Faith (CDF) published on 16 July 2020 its “*Vademecum* on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics.”<sup>1</sup> Such an instrument was

<sup>1</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, “*Vademecum* on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics,” 16 July 2020, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20200716\\_vademecum-casi-abuso\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html) (= *Vademecum*). The document appears in seven modern languages on the CDF website: English, French, German, Italian, Polish, Portuguese, Spanish.

identified by Pope Francis as the first of twenty-one recommendations<sup>2</sup> offered by various commissions and episcopal conferences in preparation for the Vatican Summit, 21-24 February 2019: “To prepare a practical handbook [*vademecum*] indicating the steps to be taken by authorities at key moments when a case emerges.”<sup>3</sup> The *Vademecum* also was mentioned at a press conference following the conclusion of the meeting by Father Federico Lombardi, S.J., who explained that the organizing committee would meet the following day with curial officials to address “three concrete initiatives,” among which he listed that the “Congregation for the Doctrine of the Faith will publish a *vademecum* that will help bishops around the world clearly understand their duties and task.”<sup>4</sup>

This present study intends to offer some “canonical reflections” on various aspects of the *Vademecum* which are of particular importance. Certainly, no reflections can substitute for careful study of the text of itself.<sup>5</sup>

<sup>2</sup> In presenting these recommendations, Pope FRANCIS said: “As a help, I would share with you some important criteria formulated by the various Episcopal Commissions and Conferences—they came from you and I have organized them somewhat. They are guidelines to assist in our reflection, and they will now be distributed to you. They are a simple point of departure that came from you and now return to you. They are not meant to detract from the creativity needed in this meeting.” “Incontro su ‘La Protezione dei minori nella Chiesa:’ Introduzione del Santo Padre Francesco in apertura dei lavori, 21.02.2019” [B0146], <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2019/02/21/0146/00302.html#en>

<sup>3</sup> HOLY SEE PRESS OFFICE, “Meeting on ‘The Protection of Minors in the Church’—Reflection Points,” 21 February 2019, <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/02/21/190221f.html>

<sup>4</sup> HOLY SEE PRESS OFFICE, Meeting on “The Protection of Minors in the Church” (21-24 February 2019), Statement by Federico Lombardi, S.J., Moderator of the Meeting, 24 February 2019. The 24 February 2019 press conference is recorded at: [https://www.youtube.com/watch?v=s2bNal8\\_1TE&t=538s](https://www.youtube.com/watch?v=s2bNal8_1TE&t=538s); see also Mark COLERIDGE, “Meeting on the Protection of Minors in the Church: Reflections,” in *CLSANZ Proceedings*, 53 (2019), 50-57; John A. RENKEN, “Safeguarding God’s People as a Synodal Church: Reflections after the Vatican Summit on the Protection of Minors, 21-24 February 2019,” in *SCL*, 14 (2019), 37-87.

<sup>5</sup> See also other reflections on the *Vademecum*: Elise Ann ALLEN, “Vatican Pushes for Uniform Approach in Handling Clerical Abuse,” 16 July 2020, *Crux*, <https://cruxnow.com/vatican/2020/07/vatican-pushes-for-uniform-approach-in-handling-clerical-abuse/>; Brendan DALY, “An Analysis of the *Vademecum* of the Congregation for the Doctrine of the Faith,” in *The Canonist*, 11 (2020), 197-217; Luis F. LADARIA, S.J., “Cardinal Ladaria: A Text with Contributions from Local Churches That Will Be Kept Up-to-date,” 16 July 2020, *Vatican News*, <https://www.vaticannews.va/en/vatican-city/news/2020-07/ladaria-vademecum-cdf-sexual-abuse-minors-clergy.html>; Gerardo NÚÑEZ, “Vademécum sobre abusos de menores de la Congregación para la Doctrina de la Fe: Reflexiones jurídicas y pastorale,” in *Ius canonicum*, 61 (2021), 139-196; Gerald O’CONNELL, “Vatican Publishes Handbook for Bishops and Religious Superiors to Guide Response to Abuse Allegations,” 16 July 2020,



## 1 — *The Vademecum: Purpose, Sources, Overview*

The *Vademecum* is intended “primarily for ordinaries and other personnel needing to apply the canonical norms governing cases of sexual abuse of minors by clerics ... to [help them] better understand and implement the requirements of justice regarding a *delictum gravius* that constitutes for the whole Church a profound and painful wound that cries out for healing.”<sup>6</sup> It is presented as “a handbook for those charged with ascertaining the truth in such criminal cases, leading them step-by-step from the *notitia criminis* to the definitive conclusion of the case.” The norms of the *Vademecum* have the juridical nature of the instructions (*instructiones*) of canon 34 and, as such, the purpose of the *Vademecum* is not “issuing new norms or altering current canonical legislation.”<sup>7</sup> Instead, it “seeks to clarify the various stages of the procedures involved. Its use is to be encouraged, since a standardized *praxis* will contribute to a better administration of justice.”<sup>8</sup> The *Vademecum* does not intend to replace canonical formation in penal law, substantive or procedural. It admits: “Only a profound knowledge of the law and its aims can render due service to truth and justice, which are especially to be sought in matters of *graviora delicta* by reason of the deep wounds they inflict upon ecclesial communion.”<sup>9</sup>

The *Vademecum* is composed of an introduction, 164 articles, a brief conclusion, two preliminary *notanda*, seventeen footnotes, and an attached

*America Magazine*, <https://www.americamagazine.org/faith/2020/07/16/vatican-publishes-handbook-bishops-and-religious-superiors-guide-response-abuse> ; Isabella PIRO, “Vatican Issues *Vademecum*: Procedures regarding Cases of Sexual Abuse of Minors,” 16 July 2020, *Vatican News*, <https://www.vaticannews.va/en/vatican-city/news/2020-07/vademecum-procedures-cases-sexual-abuse-minors-clergy.html> ; Andrea TORNIELLI, “Archbishop Morandi: ‘A Manual to Explain How to Act When Abuse is Reported’” [An interview with Archbishop Giacomo Morandi], 16 July 2020, *Vatican News*, <https://www.vaticannews.va/it/vaticano/news/2020-07/vademecum-dottrina-fede-abusi-minori-intervista-giacomo-morandi.html> (= Morandi, “A Manual to Explain”) ; Devin WATKINS, “Vademecum ‘a major step forward’ in protecting minors” [An interview with Prof. Myriam Wijlens], 22 June 2020, *Vatican News*, <https://www.vaticannews.va/en/vatican-city/news/2020-07/miriam-wijlens-protection-of-minors-interview-cdf-vademecum.html>

<sup>6</sup> *Vademecum*, Introduction. The HOLY SEE PRESS OFFICE explained that “clergy” includes deacons, priests, and bishops: “Comunicato della Sala Stampa della Santa Sede, 16.07.2020.” [B0386], <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2020/07/16/0386/00889.html>

<sup>7</sup> *Vademecum*, Introduction. No canon corresponding to *CIC* canon 34 is in the *CCEO*.

<sup>8</sup> *Vademecum*, Introduction.

<sup>9</sup> *Vademecum*, Conclusion.

“tabular summary for cases of *delicta reservata*.” It identifies its eight sources as:

- (1) 1983 *Code of Canon Law*
- (2) 1990 *Code of Canons of the Eastern Churches*
- (3) Pope John Paul II, apostolic letter *motu proprio Sacramentorum sanctitatis tutela*, 30 April 2001<sup>10</sup>
- (4) CDF, *Normae de gravioribus delictis*, 21 May 2010<sup>11</sup>
- (5) Pope Francis, apostolic letter *motu proprio Vos estis lux mundi*, 7 May 2019<sup>12</sup>

<sup>10</sup> Pope JOHN PAUL II, apostolic letter *motu proprio Sacramentorum sanctitatis tutela*, 30 April 2001, [http://www.vatican.va/content/john-paul-ii/en/motu\\_proprio/documents/hf\\_jp-ii\\_motu-proprio\\_20020110\\_sacramentorum-sanctitatis-tutela.html](http://www.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_20020110_sacramentorum-sanctitatis-tutela.html) (= SST).

<sup>11</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normae de gravioribus delictis*, 21 May 2010, [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (= 2010 *Normae*).

<sup>12</sup> POPE FRANCIS, apostolic letter *motu proprio Vos estis lux mundi*, 7 May 2019, [http://www.vatican.va/content/francesco/en/motu\\_proprio/documents/papa-francesco-motu-proprio-20190507\\_vos-estis-lux-mundi.html](http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html) (= *Vos estis*).

For commentaries on *Vos estis*, see Innasi AMALRAJ, “*Vos estis lux mundi*: Procedural Norms on Protecting Minors and Vulnerable Adults,” in *Indian Theological Studies*, 56 (2019), 307-358; Damián ASTIGUETA, “Lectura de *Vos estis lux mundi*,” in *Scientia canonica*, 2/3 (2019), 21-53; IDEM, “Lettura di *Vos estis lux mundi*,” in *Periodica*, 108 (2019), 517-550; Rodger AUSTIN et al., “*Vos estis lux mundi*—An Open Forum,” in *CLSANZP*, 53 (2019), 68-84; Brendan DALY, “*Vos estis lux mundi*: New Procedures for Dealing with Complaints of Abuse,” in *The Canonist*, 10 (2019), 114-163; Pius Barinaadaa KII, *Dealing with Clerical Sexual Abuse of Minors: New Norms*, Enugu, Nigeria, Fourth Dimension Publishing Co., 2019; Aidan McGRATH, “*Vos estis lux mundi*. A Canonist Reads the *Motu Proprio* of Pope Francis,” in *CLSGBI Newsletter*, 197 (2020), 3-34; Marc OUELLET, “Medidas eficazes contra o flagelo dos abusos a propósito do *motu proprio* ‘*Vos estis lux mundi*’,” in *Forum canonicum*, 14 (2019), 93-96; Thomas John PAPROCKI, “Confronting the Myths and Realities of Clerical Sexual Abuse of Minors in the Catholic Church,” in *StC*, 53 (2019), 603-625; Antonio RELLA RÍOS, “Apuntos sobre el m.p. *Vos estis lux mundi*,” in *Anuario de derecho canónico*, 9 (April 2020), 67-84; John A. RENKEN, “Les droits canoniques des victimes dans le droit canonique : Étude de la lettre apostolique *Vos estis lux mundi* du Pape François,” in Stéphane JOULAIN, Karlijn DEMASURE, and Jean-Guy NADEAU (eds.), *L’Église déçisée. Comprendre et traverser la crise des abus sexuels sur mineurs*, Paris, Bayard, 2021, 428-440; IDEM, “*Vos estis lux mundi*: The Evolution of the Church’s Response to Sexual Abuse and Its Cover-Up after the Vatican Summit,” in *StC*, 53 (2019), 627-658; Rafael Rodríguez Ocaña, “El *motu proprio Vos estis lux mundi*,” in *IC*, 59 (2019), 825-884; José Luis SÁNCHEZ-GIRÓN, “El ‘*motu proprio*’ ‘*Vos estis lux mundi*’: Contenidos y relación con otras normas del derecho canónico vigente,” in *Estudios eclesíásticos*, 94 (2019), 686-687, 698-699; George THEKKEKARA, “An Overview of the *Vos estis lux mundi*,” in *Ephrem’s Theological Journal*, 23 (2019), 150-174.

- (6) Secretariat of State (Cardinal Pietro Parolin) and Congregation for the Doctrine of the Faith (Cardinal Luis Francisco Ladaria, Prefect), *Rescriptum ex audientia SS.MI*, 3 December 2019<sup>13</sup>
- (7) Secretariat of State (Cardinal Pietro Parolin), *Rescriptum ex audientia SS.MI*, Instruction on the Confidentiality of Legal Proceedings, 6 December 2019<sup>14</sup>
- (8) CDF, *praxis*.<sup>15</sup>

Though it focuses on the delict of clerical sexual abuse of a minor,<sup>16</sup> the *Vademecum* “is to be used—with eventual adaptations—in all cases involving delicts reserved to the Congregation for the Doctrine of the Faith.”<sup>17</sup> It addresses various aspects of the penal preliminary investigation and the extrajudicial penal process, but it does not provide “guidelines for carrying out the judicial penal process in the first grade of judgment since it was felt that the procedure set forth in the present Codes is sufficiently clear and detailed.”<sup>18</sup> Indeed, though there is no indication that it intends to be only an “experimental” guide, the *Vademecum* envisions that it “can be periodically updated if the norms to which it refers are modified, or if the *praxis* of the Congregation calls for further clarifications and revisions.”<sup>19</sup>

<sup>13</sup> SECRETARIAT OF STATE and CDF, *Rescriptum ex audientia SS.MI*, 3 December 2019, [http://www.vatican.va/roman\\_curia/secretariat\\_state/2019/documents/rc-seg-st-20191203\\_rescriptum\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2019/documents/rc-seg-st-20191203_rescriptum_en.html) (= 3 December 2019 *Rescriptum*).

<sup>14</sup> SECRETARIAT OF STATE, *Rescriptum ex audientia SS.MI*, 6 December 2019, [http://www.vatican.va/roman\\_curia/secretariat\\_state/2019/documents/rc-seg-st-20191206\\_rescriptum\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2019/documents/rc-seg-st-20191206_rescriptum_en.html) (= 6 December 2019 *Rescriptum*).

<sup>15</sup> See Jordi BERTOMEU FARNÓS, “La praxis de la Congregación para la Doctrina de la Fe, expresión de un ‘cambio de mentalidad’,” in *Ius canonicum*, 60/119 (2020), 31-60.

<sup>16</sup> 2010 *Normae*, art. 6.

<sup>17</sup> *Vademecum*, nota bene, a. For an enlightening consideration of the resolution of various cases of *graviora delicta* reserved to the CDF, see Claudio PAPALE, *Delicta reservata: 130 casi giuridici*, Quaderni di Ius Missionale 15, Rome, Urbaniana University Press, 2021.

<sup>18</sup> *Vademecum*, Introduction. See Frederick C. EASTON, “The Development of CIC Canon 1342 § 1 and Its Impact on the Use of the Extra-judicial Penal Process,” in *StC*, 48 (2014), 129-149; Robert J. GEISINGER, “*Delicta graviora*: Current Issues in Jurisprudence and Practice,” in *CLSanz Proceedings*, 52 (2018), 25-28; IDEM, “*Delicta graviora*: Judicial and Extrajudicial Penal Proceedings,” in *CLSanz Proceedings*, 52 (2018), 29-26; Valère NKOUAYA MBANDJI, “L’instruction d’une cause pénale,” in *StC*, 53 (2019), 561-601; John A. RENKEN, “Penal Law: A Realization of the *Misericordiae vultus Ecclesiae*,” in *StC*, 50 (2016), 134-137.

<sup>19</sup> *Vademecum*, Introduction. One notes that the *Vademecum* is identified as “Version 1.0” on the CDF website. It seems certain that the *Vademecum* will be modified by the revised Book VI of the *CIC*. Similarly, *Vos estis* concludes with an indication of its envisioned revision: “The present norms are approved *ad experimentum* for three years.”

## 2 — *The Reserved Delict of Clerical Sexual Abuse of a Minor*

The *Vademecum* provides a helpful working description of the reserved delict simply identified as “every external offense against the sixth commandment of the Decalogue committed by a cleric with a minor.”<sup>20</sup> Obviously reflecting the jurisprudence and *praxis* of the CDF, it explains that the delict is “quite broad” and can include the following behaviors: “sexual relations (consensual or non-consensual), physical contact for sexual gratification, exhibitionism, masturbation, the production of pornography, inducement to prostitution, conversations and/or propositions of a sexual nature, which can also occur through various means of communication.”<sup>21</sup>

Canon 97 § 1 defines a minor as a person under the age of eighteen years. The *Vademecum* explains that, prior to *SST*, the delict of clerical sexual abuse involved only minors under the age of sixteen years, but *SST* raised the scope of the delict to include all minors.<sup>22</sup> And, with the 2010 *Normae*, to be equated to a minor is the person who habitually has the imperfect use of reason.<sup>23</sup>

Further, the 2010 *Normae* introduced the delict of “the *acquisition, possession, or distribution* by a cleric of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology.”<sup>24</sup> On 3 December 2019, Pope Francis extended the delict to include images of minors “under the age of 18,” effective 1 January 2020.<sup>25</sup>

<sup>20</sup> *Vademecum*, art. 1 which refers to *CIC*, c. 1395 § 2 (*nunc*, c. 1398 § 1); 2010 *Normae*, art. 6 § 1, 1°.

<sup>21</sup> *Vademecum*, art. 2.

<sup>22</sup> *Vademecum*, art. 3 which recounts: “The concept of ‘minor’ in these cases has varied over the course of time. Prior to 30 April 2001, a minor was defined as a person under 16 years of age (even though in some particular legislations—for example in the United States [from 1994] and Ireland [from 1996]—the age had already been raised to 18). After 30 April 2001, with the promulgation of the *motu proprio Sacramentorum Sanctitatis Tutela*, the age was universally raised to 18 years, and this is the age currently in effect.”

<sup>23</sup> 2010 *Normae*, art. 6 § 1, 1°: “persona quae imperfecto rationis usu habitu pollet.”

<sup>24</sup> 2010 *Normae*, art. 6 § 1, 2°. Emphasis added. See Mark L. BARTCHAK, “Child Pornography and the Grave Delict of an Offense against the Sixth Commandment of the Decalogue Committed by a Cleric with a Minor,” in *Periodica*, 100 (2011), 285-380; reprinted in *Jur*, 72 (2012), 178-239; Varuvel G. DHAS, “Il delitto di pornografia minorile da parte di un chierico,” in *Apollinaris*, 87 (2014), 149-170; Massimo DI VEROLI, “Pedopornografia: Aspetti tecnico informatici utili all'accertamento della responsabilità penali da parte dell'autore,” in Claudio PAPALE (ed.), *I delitti riservati alla Congregazione per la dottrina della fede. Norme, prassi, obiezioni*, Quaderni di Ius Missionale 5, Rome, Urbaniana University Press, 2015, 131-159.

<sup>25</sup> 3 December 2019 *Rescriptum*, art. 1.

Significantly, the *Vademecum* clarifies that *production* of pornography involving minors by a cleric has consistently been considered a delict, even before the 2010 *Normae*, as indicated in article 2 of the *Vademecum*. Indeed, the 2010 *Normae* did not address the *production* of pornography involving minors since the *praxis* of the CDF already considered it to be a reserved delict. Thus, the CDF is competent to address this delict whenever it occurred.<sup>26</sup>

The delicts of sexual abuse are reformulated in the 2021 revision of Book VI by Pope Francis:

Canon 1395—§3. A cleric who by force, threats, or abuse of his authority commits a delict against the sixth commandment of the Decalogue, or who compels someone to perform or submit to sexual acts, is to be punished with the same penalty mentioned in [c. 1395] §2 [i.e., with just penalties, not excluding dismissal from the clerical state if the case so warrants].

Canon 1398—§1. A cleric is to be punished with privation of office and other just penalties, not excluding dismissal from the clerical state if the case warrants it:

- 1° who commits a delict against the sixth commandment of the Decalogue with a minor or with a person who habitually has the imperfect use of reason or with a person for whom the law recognizes equal protection;
- 2° who grooms or induces a minor or a person who habitually has the imperfect use of reason or a person for whom the law recognizes equal protection, to show himself or herself pornographically or to participate in pornographic exhibitions, whether real or simulated;
- 3° who immorally acquires, possesses, exhibits, or distributes, by any means and using whatever technology, pornographic images of minors or of persons who habitually have the imperfect use of reason.

§2. A member of an institute of consecrated life or society of apostolic life, and any member of the faithful who has any dignity or who fulfills an office or function in the Church, if the person commits the delict mentioned in §1 or in canon 1395 §3, is to be punished according to the norm of canon 1336, §§2-4, with other penalties also added according to the gravity of the delict.

The 2021 revision of Book VI reformulates the delicts of sexual abuse to include:

- sexual abuse resulting from “abuse of authority”
- sexual abuse resulting from compelling someone to perform or to submit to sexual acts

<sup>26</sup> *Vademecum*, art. 7.

- sexual abuse with a minor, a person who habitually has the imperfect use of reason, or a person for whom the law recognizes equal protection (an obvious reference to “vulnerable persons”)<sup>27</sup>
- sexual abuse involving grooming or inducing a minor, a person who habitually has the imperfect use of reason, or a person for whom the law recognizes equal protection, to show himself or herself pornographically or to participate in pornographic exhibitions, whether real or simulated
- sexual abuse involving the acquisition, possession, exhibition, or distribution, by any means and using whatever technology, of pornographic images of minors or of persons who habitually have the imperfect use of reason.

Further, the 2021 revision of Book VI includes among perpetrators of the delicts of sexual abuse “any member of the faithful who has any dignity or who fulfills an office or function in the Church,” together with clerics and members of institutes of consecrated life or societies of apostolic life.<sup>28</sup>

It is important to note that the *Vademecum* concerns only the delicts of sexual abuse of minors (i.e., persons under the age of eighteen years and those who habitually have the imperfect use of reason), and committed by clerics, since only these are reserved to the CDF. The delict of sexual abuse of “a person to whom the law grants equal protection” committed by clerics is not a *gravius delictum* reserved to the CDF. Nor are *any* delicts of sexual abuse committed by non-ordained offenders reserved to the CDF.

Because various aspects of this delict have changed over the years, it is important for the ordinary to ascertain the precise time of any alleged abuse in order to determine whether it constituted a delict. Clearly, the victim’s “degree of sexual maturity does not affect the canonical definition of the delict.”

<sup>27</sup> “Vulnerable persons” is not a univocal term, and thus it admits various interpretations and subsequent applications: such ambiguity is always dangerous in law. In canon 1398 § 1, 1° and 2°, the Legislator uses the phrase “a person for whom the law recognizes equal protection” which, obviously, intends to include one currently said to be a “vulnerable person.” The “law” recognizing equal protection is not in the Code. Currently, the law describing such a protected person (called a “vulnerable person”) is *Vos estis lux mundi*, art. 1, § 2 b) that describes a “vulnerable person” thus: “any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offence.”

<sup>28</sup> *Vademecum*, art. 8 recounts that sexual abuse of minors by members of religious institutes (c. 695 § 1) and members of societies of apostolic life (c. 746) is occasion for non-penal dismissal, that is, “an administrative act of the supreme moderator.” One recalls, though, that *Vos estis*, art. 1 § 1, a) establishes such sexual abuse of minors (and vulnerable persons) to be a delict for members of institutes of consecrated life and societies of apostolic life, making them liable to dismissal as a penalty. See Velasio DE PAOLIS, *La vita consecrata nella Chiesa*, rev. ed., Venice, Marcianum Press, 2010, 580.

### 3 — *Initial Information about a Possible Delict: The Notitia de delicto*

The *Vademecum* addresses the origin of initial information about a possible delict (the *notitia de delicto* or the *notitia criminis*),<sup>29</sup> and the response of the ordinary/hierarchy to that information.

#### 3.1 — The Origin of the *Notitia de delicto*

The initial information about the possibility of a delict can come to the ordinary/hierarchy from various sources:

- the alleged victim, his/her guardians, written or orally
- others claiming knowledge, written or orally
- the exercise of the duty of vigilance of the ordinary/hierarchy<sup>30</sup>
- civil authorities acting in accord with local legislation
- communications media, including social media
- hearsay
- anonymous sources (i.e., unidentified or unidentifiable persons)
- any other way.<sup>31</sup>

Concerning anonymous sources, the *Vademecum* advises: “The anonymity of the source should not automatically lead to considering the report as false. Nonetheless, for easily understandable reasons, great caution should be exercised in considering this type of *notitia*, and anonymous reports certainly should not be encouraged.”<sup>32</sup> Likewise, it advises that the ordinary/

<sup>29</sup> *Vademecum*, art. 9.

<sup>30</sup> *Vademecum*, art. 15 discusses the vigilance role of the ordinary/hierarchy: “The responsibility for vigilance incumbent on the ordinary or hierarchy does not demand that he constantly monitor the clerics subject to him, yet neither does it allow him to consider himself exempt from keeping informed about their conduct in these areas, especially if he becomes aware of suspicions, scandalous behaviour, or serious misconduct.” See PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, explanatory note “Elementi per configurare l’ambito di responsabilità canonica del vescovo diocesano nei riguardi dei presbiteri incardinati nella propria diocesi e che esercitano nella medesima il loro ministero,” 12 February 2004, in *Comm*, 36 (2004), 33-38.

<sup>31</sup> *Vademecum*, arts. 10-11, reconfigured by this author.

<sup>32</sup> *Vademecum*, art. 11. Archbishop Giacomo Morandi, secretary of the CDF, discusses the *Vademecum*’s treatment of anonymous allegations: “[The treatment of anonymous complaints] is a delicate question. It has become clear that a peremptory attitude in one sense or another is not conducive to the search for truth and justice. How can a complaint which, even if anonymous, contains certain evidence (e.g. photos, films, messages, audio ...), or at least concrete and plausible clues of the commission of a crime, be thrown out? Ignoring it just because it is not signed would be wrong. On the other hand, how can all reports of abuse

hierarchy should not dismiss *a priori* information coming from “sources whose credibility might appear at first doubtful.”<sup>33</sup> Any “vague or unclear” initial information “should be appropriately assessed and, if reasonably possible, given all due attention.”<sup>34</sup>

Completely excluded as a source of initial information about a delict is knowledge gained in the sacrament of penance.<sup>35</sup> The sacramental seal is “inviolable.”<sup>36</sup> This was reiterated by the Apostolic Penitentiary in 2019.<sup>37</sup>

be accepted, even generic ones and those without a sender? In this case, it would be inappropriate to proceed. It is therefore necessary to carry out a careful discernment. Generally speaking, we do not fully credit anonymous complaints, but we also do not forego *a priori* their initial evaluation, in order to see if there are objective and obvious determinants, those which we call *fumus delicti* in legal language.” Morandi, “A Manual to Explain.”

However, earlier legislative texts seemed more disinclined to welcome information from anonymous sources. The weight to be given to anonymous documents is addressed in *Dignitas connubii*: “So-called anonymous letters and other anonymous documents of any kind whatsoever, per se cannot be considered even an indication, unless they describe facts which can be verified from other sources, and only to the extent that they can be so verified” (DC, art. 188). This *literally* reiterates SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction *Provida Mater*, in AAS, 28 (1936), 313-372, art. 165; see also IDEM, Decree *Catholica doctrina*, 7 May 1923, in AAS, 15 (1923), 389-436, art. 77 § 1: “No document has credit unless it proved to be authentic and genuine.”

<sup>33</sup> *Vademecum*, art. 12.

<sup>34</sup> *Vademecum*, art. 13.

<sup>35</sup> *Vademecum*, art. 14 which refers to CIC, c. 983 § 1; CCEO, c. 733 § 1; 2010 *Normae*, art. 4 § 1, 5°.

<sup>36</sup> CIC, c. 983 § 1; CCEO, c. 733 § 1. See also CIC, cc. 984-985; CCEO, c. 734.

<sup>37</sup> See APOSTOLIC PENITENTIARY, “Note of the Apostolic Penitentiary on the Importance of the Internal Forum and the Inviolability of the Sacramental Seal,” 29 June 2019, [http://www.vatican.va/roman\\_curia/tribunals/apost\\_penit/documents/rc\\_trib\\_appen\\_pro\\_20190629\\_forointerno\\_en.html](http://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20190629_forointerno_en.html); see also: Cardinal Mauro PIACENZA, “Presentation of the Note of the Apostolic Penitentiary on the importance of the internal forum and the inviolability of the sacramental seal,” 1 July 2019, <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/07/01/190701e.html>; “Observations of the Holy See [to the Royal Commission Report] (Enclosure with Letter N. 484.110, of 26 February 2020),” [https://www.catholic.org.au/images/Observations\\_of\\_the\\_Holy\\_See\\_to\\_the\\_Recommendations\\_of\\_the\\_Royal\\_Commission.pdf](https://www.catholic.org.au/images/Observations_of_the_Holy_See_to_the_Recommendations_of_the_Royal_Commission.pdf); VATICAN NEWS, “Australia: Holy See Responds to Royal Commission Recommendations,” 4 September 2020, <https://www.vaticannews.va/en/vatican-city/news/2020-09/australia-holy-see-commission-response.html>; Giacomo INCITTI, “Aspetti pratici nel sacramento della riconciliazione riguardanti la protezione dei minori e degli adulti vulnerabili,” in *Periodica*, 109 (2020), 581-607; Ronny E. JENKINS, “Canonical Exclusionary Rules and the Just Adjudication of Delicts against the Sacrament of Penance,” in *CLSAP*, 79 (2017), 122-141; Luis F. LADARIA, “Fondamenti e implicazioni teologiche del Sacramento della Riconciliazione,” in *Periodica*, 109 (2020), 429-446; Robert W. OLIVER, “The Competence of the Congregation for the Doctrine of the Faith for the Delict of the Violation of the Sacramental Seal,” in Claudio PAPAIE (ed.), *I delitti contro il sacramento della penitenza riservati alla Congregazione per la dottrina della fede*, Quaderni di Ius Missionale 7, Rome, Urbaniana University Press, 2016, 19-32;



The *Vademecum* suggests: “A confessor who learns of a *delictum gravius* during the celebration of the sacrament should seek to convince the penitent to make that information known by other means, in order to enable the appropriate authorities to take action.”<sup>38</sup>

### 3.2 — The Response of the Ordinary/Hierarchy to *Notitia de delicto*

When he receives the initial information of an alleged delict, the ordinary/hierarchy typically begins a penal preliminary investigation if the initial report has the semblance of truth (*saltem verisimilis*), unless the investigation “seems entirely superfluous” (*omnino superflua*).<sup>39</sup> If the plausibility of the information proves “unfounded,” there is no need to proceed “although care should be taken to keep the documentation, together with a written explanation regarding the reasons for the decision.”<sup>40</sup> The decision not to proceed is “made only in the case of the manifest impossibility of proceeding according to the norms of canon law,” for instance, “if it turns out that at the time of the delict of which he is accused, the person was not yet a cleric; if it comes to light that the presumed victim was not a minor; if it is a well-known fact that the person accused could not have been present at the place of the delict when the alleged actions took place.”<sup>41</sup> The *Vademecum* advises, further, that the ordinary/hierarchy communicate to the CDF the initial information and his rationale in not proceeding due to the “manifest lack of the semblance of truth.”<sup>42</sup>

If the initial information reveals that the cleric engaged in “improper and imprudent conduct, even in the absence of a delict involving minors,” the ordinary/hierarchy may choose, in order to preclude scandal and to protect the common good, “to take other administrative provisions with regard to the person accused (for example, restrictions on his ministry), or to impose the penal remedies mentioned in canon 1339 *CIC* for the purpose of preventing delicts (cf. c. 1312 § 3 *CIC*) or to give the public reprimand referred to in canon 1427 *CCEO*.”<sup>43</sup> Of course, the ordinary/hierarchy “should employ the juridical means appropriate to the particular circumstances” when the initial investigation identifies that the

Rafael PALOMINO LOZANO, “Sigilo de confesión y abuso de menores,” in *IC*, 59 (2019), 767-809; Vimal TIRIMANNA, “A Brief History and Theology of the Sacrament of Reconciliation: A Study with References to the Seal of Confession,” in *Periodica*, 109 (2020), 548-580.

<sup>38</sup> *Vademecum*, art. 14.

<sup>39</sup> *CIC*, c. 1717 § 1 and *CCEO*, c. 1468 § 1.

<sup>40</sup> *Vademecum*, art. 16; see *CIC*, c. 1719 and *CCEO*, c. 1470.

<sup>41</sup> *Vademecum*, art. 18 which refers to art. 3 on identifying a minor. These are examples of notifications that do not have the semblance of truth: they are not *saltem verisimiles*.

<sup>42</sup> *Vademecum*, art. 19.

<sup>43</sup> *Vademecum*, art. 20.

cleric committed delicts which are not *graviora delicta*.<sup>44</sup> Moreover, the *Vademecum* directs the ordinary/hierarchy to report the initial information to the “competent civil authorities”—“even in cases where there is no explicit [civil] legal obligation to do so” and “if this is considered necessary to protect the person involved or other minors from the danger of further criminal acts.”<sup>45</sup>

If the initial information has the semblance of truth, the ordinary/hierarchy will proceed with the preliminary investigation. Failure to conduct the preliminary investigation could constitute a delict.<sup>46</sup>

#### 4 — The Penal Preliminary Investigation

The penal preliminary investigation is addressed in *CIC*, canons 1717-1719;<sup>47</sup> in *CCEO*, canons 1468-1470;<sup>48</sup> and in 2010 *Normae*, arts. 16-19.

<sup>44</sup> *Vademecum*, art. 20.

<sup>45</sup> *Vademecum*, art. 17. In commenting on the 6 December 2019 *Rescriptum*, Professor Giuseppe DALLA TORRE, former President of the Vatican City State Tribunal, reflected that the *Rescriptum* promoted “an attitude of trust and healthy collaboration” reflecting the teaching of Vatican II:

In conclusion it may be said that the changes to the pontifical secret now effected by Pope Francis are part of the long process aimed at the repression of an abominable phenomenon, of which the *motu proprio Vos estis lux mundi* of 7 May last constitutes a fundamental milestone; on the other hand, they contribute to favouring the passage of the canonical order from an attitude of distrust and defence with regard to the state systems, to an attitude of trust and healthy collaboration. And this is in line with what was indicated by Vatican Council II in par. 76 of the pastoral constitution *Gaudium et spes*.

HOLY SEE PRESS OFFICE, “Contribution of Professor Giuseppe Dalla Torre, Former President of the Vatican City State Tribunal on the Publication of the Rescript of the Holy Father Francis *On the Confidentiality of Legal Proceedings*: An Act that Facilitates Collaboration with the Civil Authorities,” 17 December 2019, <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217f.html>

<sup>46</sup> *Vademecum*, art. 21, which refers to the *CIC*, *Vos estis*, art. 1 § 1 b), and POPE FRANCIS, apostolic letter *motu proprio Come una madre amorevole*, 4 June 2016, [http://w2.vatican.va/content/francesco/en/apost\\_letters/documents/papa-francesco\\_lettera-ap\\_20160604\\_come-una-madre-amorevole.html](http://w2.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_lettera-ap_20160604_come-una-madre-amorevole.html)

The English, Spanish, Portuguese, and Polish versions of the *Vademecum*, art. 21, refer only to the *CIC*. The Italian, French, and German versions also refer to the *CCEO*. Although they are not identified in the *Vademecum*, the pertinent canons are *CIC*, c. 1378 and *CCEO*, c. 1464.

<sup>47</sup> See Valère NKOUAYA MBANDJI, “L’enquête préliminaire dans la procédure pénale canonique,” in *StC*, 54 (2020), 181-219; John A. RENKEN, *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 2015, 387-410.

<sup>48</sup> See Frederick C. EASTON, “Title XXVII. The Procedure for Imposing Penalties: Canons 1468-1487,” in John D. FARIS and Jobe ABBASS (eds.), *A Practical Commentary to the Code of Canons of the Eastern Churches*, Montréal, Librairie Wilson and Lafleur, Inc., 2019,

The *Vademecum* devotes most of its articles to it: articles 21-75. These articles concern: the competent authority to conduct the preliminary investigation; observance of civil requirements; prescription and the derogation from prescription; secret of office; the purpose of the preliminary investigation; initiating the preliminary investigation; protection of good names and the common good; involvement of the accused cleric; care for the alleged victim; administrative restrictions on the accused cleric; duration of the preliminary investigation; concluding the preliminary investigation.

#### 4.1 — The Competent Authority to Conduct the Preliminary Investigation

The preliminary investigation is conducted by the ordinary/hierarchy (1) of the accused cleric or, if different, (2) of the place of the alleged delict. If both are involved, the *Vademecum* expects “communication and cooperation” between them “to avoid conflicts of competence or the duplication of labour, particularly if the cleric is a religious.”<sup>49</sup> It recalls the requirement of *Vos estis*, article 2 § 3 and explains:

[An] ordinary who has received a *notitia de delicto* must transmit it immediately to the ordinary or hierarchy of the place where the events were said to have occurred, as well as to the proper ordinary or hierarchy of the person reported, namely, in the case of a religious, to his major superior, if the latter is his proper ordinary, and in the case of a diocesan priest, to the ordinary of the diocese or the eparchial bishop of incardination. In cases where the local ordinary or hierarchy and the proper ordinary or hierarchy are not the same person, it is preferable that they contact each other to determine which of them will carry out the investigation. In cases where the report concerns a member of an institute of consecrated life or a society of apostolic

2613-2655; Pablo GEFAELL, “Specificità del diritto penale orientale,” in Georges RUYSEN and Sunny KOKKARAVAYIL (eds.), *Il CCEO—Strumento per il futuro delle Chiese orientali cattoliche. Atti del Simposio di Roma, 22-24 febbraio 2017, Centenario del Pontificio Istituto Orientale (1917-2017)*, Kanonika 25, Rome, Edizioni Orientalia Christiana, 2017, 587-611; Zenon GROCHOLEWSKI and Michael KUCHERA, “Title 28. Procedure for Imposing Penalties (cc. 1468-1487),” in Georges RUYSEN (ed., 2<sup>nd</sup> ed.), *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches*, 2<sup>nd</sup> rev. ed., Kanonika 10/2020, Rome, Edizioni Orientalia Christiana, 2020, 997-1005; Francis G. MORRISSEY, “The Response of the Eastern Catholic Churches in North America to the Sexual Abuse Crisis,” in Georges RUYSEN and Sunny KOKKARAVAYIL (eds.), *Il CCEO—Strumento per il futuro delle Chiese orientali cattoliche. Atti del Simposio di Roma, 22-24 febbraio 2017, Centenario del Pontificio Istituto Orientale (1917-2017)*, Kanonika 25, Rome, Edizioni Orientalia Christiana, 2017, 791-817.

<sup>49</sup> *Vademecum*, art. 22.

life, the major superior will also inform the supreme moderator and, in the case of institutes and societies of diocesan right, also the respective bishop.<sup>50</sup>

The CDF can be involved in the preliminary investigation: (1) if the *notitia de delicto* comes directly to the CDF, which can conduct the preliminary investigation or entrust it to the appropriate ordinary/hierarchy;<sup>51</sup> (2) if “by explicit request or by necessity,” the CDF decides to entrust it to any other ordinary/hierarchy;<sup>52</sup> and (3) if an ordinary/hierarchy seeks the advice or assistance of the CDF.<sup>53</sup> In relation to the lattermost situation, the *Vademecum* says:

In these sensitive preliminary acts, the ordinary or hierarchy can seek the advice of the CDF (as is possible at any time during the handling of a case) and freely consult with experts in canonical penal matters. In the latter case, however, care should be taken to avoid any inappropriate or illicit diffusion of information to the public that could prejudice successive investigations or give the impression that the facts or the guilt of the cleric in question have already been determined with certainty.<sup>54</sup>

The last part of this article stresses that the accused is presumed innocent of the delict until proven guilty.<sup>55</sup>

<sup>50</sup> *Vademecum*, art. 31.

<sup>51</sup> *Vademecum*, art. 24. See 2010 *Normae*, art. 17.

<sup>52</sup> *Vademecum*, art. 25.

<sup>53</sup> *Vademecum*, art. 23.

<sup>54</sup> *Vademecum*, art. 29.

<sup>55</sup> Inserted during the 2021 revision of Book VI, canon 1321 §1 identifies the presumption of innocence: “Anyone is deemed innocent until the contrary is proven.” The *Vademecum* never mentions the presumption of innocence directly. One hopes that an eventual revision of the handbook would make clear reference to this presumption, as had Pope Francis, *Vos estis*: §7. The person under investigation enjoys the presumption of innocence; (art. 12 §7); and CDF, “Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics,” 3 May 2011, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20110503\\_abuso-minori\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html) : “The accused cleric is presumed innocent until the contrary is proven. Nonetheless the bishop is always able to limit the exercise of the cleric’s ministry until the accusations are clarified. If the case so warrants, whatever measures can be taken to rehabilitate the good name of a cleric wrongly accused should be done.” (art. I, d, 3).

See also PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, 29 June 2004, no. 404, Libreria Editrice Vaticana, 2004, n. 404; Francisco José CAMPOS MARTÍNEZ, “Presunción de inocencia e investigación previa canónica. Pautas para un procedimiento justo en denuncias por abuso sexual,” in *Periodica*, 108 (2019), 471-516; Kenneth PENNINGTON, “Innocent until Proven Guilty: The Origins of a Legal Maxim,” in Patricia M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law: Proceedings of a Conference Held at the Pontifical University of the Holy Cross, Rome, March 25-26, 2004*, Gratianus Series, Montreal, Wilson and Lafleur, 2005, 45-66.

## 4.2 — Observance of Civil Requirements

The preliminary investigation must respect local civil law.<sup>56</sup> Typically, it is to be conducted independently of any civil investigation. Nonetheless, the *Vademecum* remarks about civil processes: (1) “In those cases where state legislation prohibits investigations parallel to its own, the ecclesiastical authorities should refrain from initiating the preliminary investigation and report the accusation to the CDF, including any useful documentation.”<sup>57</sup> And, (2) “In cases where it seems appropriate to await the conclusion of the civil investigations in order to acquire their results, or for other reasons, the ordinary or hierarch would do well to seek the advice of the CDF in this regard.”<sup>58</sup>

The *Vademecum* offers two principles to assist the ordinary/hierarch in discerning whether he is obliged to inform civil authorities about the *notitia de delicto* and the beginning of the preliminary investigation: “(a) respect for the laws of the state (cf. *Vos estis*, art. 19); and (b) respect for the desire of the alleged victim, provided that this is not contrary to civil legislation.”<sup>59</sup> It also encourages alleged victims “to exercise their duties and rights vis-à-vis the state authorities,” and directs ordinaries to take care “to document that this encouragement took place and to avoid any form of dissuasion with regard to the alleged victim.”<sup>60</sup> Indeed, any pertinent “agreements (concordats, accords, protocols of understanding) entered into by the Apostolic See with national governments must always and in any event be observed.”<sup>61</sup>

The *Vademecum* requires the ordinary/hierarch:

- to report a *notitia de delicto* if the civil laws require, “even if it is expected that on the basis of state laws no action will be taken (for example, in cases where the statute of limitations has expired or the definition of the crime may vary);”<sup>62</sup>
- to cooperate when civil authorities “issue a legitimate executive order requiring the surrender of documents regarding cases, or order the judicial seizure of such documents;”<sup>63</sup>

<sup>56</sup> *Vademecum*, art. 27.

<sup>57</sup> *Vademecum*, art. 26.

<sup>58</sup> *Vademecum*, art. 26.

<sup>59</sup> *Vademecum*, art. 48.

<sup>60</sup> *Vademecum*, art. 48; see art. 56.

<sup>61</sup> *Vademecum*, art. 48.

<sup>62</sup> *Vademecum*, art. 49.

<sup>63</sup> *Vademecum*, art. 50, which adds: “If the legitimacy of such a request or seizure is in doubt, the Ordinary or Hierarch can consult legal experts about available means of recourse. In any case, it is advisable to inform the Papal Representative immediately.”

- to follow the civil norms when hearing minors or persons equivalent to them, employing “methods suited to their age or condition, permitting, for example, that the minor be accompanied by a trusted adult and avoiding any direct contact with the person accused;”<sup>64</sup>
- to avoid any action during the preliminary investigation “that could be interpreted by the alleged victim as an obstacle to the exercise of his or her civil rights vis-à-vis the civil authorities.”<sup>65</sup>

#### 4.3 — Prescription and Its Derogation

Prescription “is a means of acquiring or losing a subjective right as well as of freeing oneself from obligations.”<sup>66</sup> “Prescription runs from the day on which the delict was committed or, if the delict is continuous or habitual, from the day on which it ceased.”<sup>67</sup> The law mentions the prescription of “criminal action”<sup>68</sup> and the prescription of “action to execute a penalty.”<sup>69</sup> The former refers to the time period during which a penal process can begin; the latter refers to the time period during which the penalty can be executed. Both prescription periods are the same time limits.<sup>70</sup>

Over the years, the prescription period for the delict of clerical sexual abuse of a minor has varied. Presently, the prescription period for all *graviora delicta* is twenty years, “with due regard to the right of the CDF to derogate from prescription in individual cases.”<sup>71</sup> For the delict of clerical sexual abuse of a minor, “prescription begins to run from the day on which a minor completes his or her eighteenth year of age.”<sup>72</sup>

The *Vademecum* requires the ordinary/hierarchy to conduct the preliminary investigation and file his report to the CDF *even if the prescription period has passed*, since the CDF is empowered to derogate from prescription in individual cases. In this situation, the CDF will decide either to retain the

<sup>64</sup> *Vademecum*, art. 51.

<sup>65</sup> *Vademecum*, art. 56.

<sup>66</sup> *CIC*, c. 197; *CCEO*, c. 1540. See Philip J. BROWN, “Prescription and the Usefulness of Time,” in Kurt MARTENS (ed.), *A Service beyond All Recompense: Essays Offered in Honor of Monsignor Thomas J. Green*, Washington, D.C., The Catholic University of America Press, 2018, 205-233; Brendan DALY, “Prescription: A Major Issue in Dealing with Sexual Abuse Cases,” in *The Canonist*, 10 (2019), 72-86.

<sup>67</sup> *CIC*, c. 1362 § 2; *CCEO*, c. 1152 § 3.

<sup>68</sup> *CIC*, c. 1362; *CCEO*, c. 1152, §§ 2-3.

<sup>69</sup> *CIC*, c. 1363; *CCEO*, c. 1153.

<sup>70</sup> See John A. RENKEN, *The Penal Law of the Roman Catholic Church*, 191-197.

<sup>71</sup> 2010 *Normae*, art. 7 § 1.

<sup>72</sup> 2010 *Normae*, art. 7 § 2.

prescription or to grant a derogation. The *Vademecum* directs the ordinary/hierarchy: “In forwarding the acts, it would be helpful for the ordinary or hierarchy to express his personal opinion regarding an eventual derogation, basing it on concrete circumstances (e.g., cleric’s health status or age, cleric’s ability to exercise right of self-defence, harm caused by the alleged criminal act, scandal given).”<sup>73</sup>

#### 4.4 — Secret of Office

“Care must be taken so that the good name of anyone is not endangered from this [preliminary] investigation.”<sup>74</sup> Accordingly, the *Vademecum* notes that one must observe the “secret of office” during the preliminary investigation.<sup>75</sup> Nonetheless, it adds: “It must be remembered, however, that an

<sup>73</sup> *Vademecum*, art. 28.

<sup>74</sup> *CIC*, c. 1717 §2; *CCEO*, c. 1468 §2.

<sup>75</sup> *Vademecum*, art. 30. In the English version of the *Vademecum*, “secret/secretcy” is found thirteen times: “secret of office” (articles 30, 47, 101, 116, 118, 140 title, 140, 164); “secret” (art. 47); “secretcy” (art. 76); “secret archive” (c. 73, n. 6), and “pontifical secret” (art. 164). In discussing the 6 December 2019 *Rescriptum*, Bishop Juan OGNACIO ARRIETA, secretary of the Pontifical Commission for Legislative Texts, explains the distinction between the “pontifical secret” and the “secret of office:”

This Instruction is intended to specify the degree of confidentiality with which news or reports of sexual abuse committed by clerics or consecrated persons against minors and other subjects determined herein must be handled, as well as any conduct by ecclesiastical authorities that might tend to silence or cover them up. As will be seen, the purpose of the new Instruction is to erase in these cases the subjection to what is called “papal secrecy,” instead bringing the “level” of confidentiality, duly required to protect the good reputation of the persons involved, back to the normal “official secrecy” established by can. 471, 2° *CIC* (can. 244 §2, 2° *CCEO*), which each Pastor or the holder of a public office is required to observe in different ways depending on whether they are subjects who have the right to know said information or whether, on the other hand, they do not have this right...

However, and this is an important detail, the fact that knowledge of these criminal actions is no longer bound by the “pontifical secret” does not mean that it provides the freedom to make it public by those in possession of it, which in addition to being immoral, would undermine the right to the good reputation of persons protected by can. 220 *CIC*. In this regard, no. 3 of the Instruction refers to those who are in any way required to officially handle such situations in the normal secrecy or official confidentiality indicated in canons 471, 2° *CIC* and 244 §2, 2° *CCEO*, as in the case of art. 2 §2 of the *motu proprio Vos estis lux mundi*. This means that persons informed of the situation or in any way involved in the inquiries or investigation of the case are required to “guarantee security, integrity and confidentiality,” and not to share information of any kind with third parties unrelated to the case. Among those involved in the trial, once formally initiated, there is obviously the accused, so the new measure also promotes the adequate right of defence.

obligation of silence about the allegations cannot be imposed on the one reporting the matter, on a person who claims to have been harmed, and on witnesses.”<sup>76</sup>

In the following two numbers of the Instruction, however, we find two other important clarifications to the duty of confidentiality. One is contained in no. 5, which, also following what is indicated by Art. 4 §3 of the *motu proprio Vos estis lux mundi*, prohibits the imposition of any kind of “bond of silence with regard to the facts of the case” on the subject who has filed the report or the complaint to the authority, or on those who allege to have been harmed, or on the witnesses who intervene in the case. The only exception to this prohibition concerns the accused himself who, in this type of measure, is regularly subjected from the beginning to various kinds of prohibitions and precautionary measures, depending on what the concrete circumstances are. Professional secrecy, therefore, concerns all those who, by reason of their role, must intervene in the handling of the case.

The other important perimeter of official secrecy, which is now further reaffirmed, always in line with the norm of art. 19 of the *motu proprio Vos estis lux mundi*, is the reminder of the due observance of the state laws established in the matter. Therefore, no. 4 of the Instruction reaffirms that the professional secrecy which must be observed in these cases may in no situation be an obstacle to “the fulfilment of the obligations laid down in all places by the laws of the State, including any reporting obligations [of possible news of a crime], and the execution of the enforcement requests of the civil courts” which, naturally, could oblige the delivery, for example, of documentary material of the external forum.

HOLY SEE PRESS OFFICE, “Contribution of H.E. Msgr. Juan Ignacio Arrieta, Secretary of the Pontifical Council for Legislative Texts on the publication of the Rescript of the Holy Father Francis *On the confidentiality of legal proceedings: Confidentiality and the Duty to Report*,” 17 December 2019, <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217f.html>

See also HOLY SEE PRESS OFFICE, “Comment by the Editorial Director, Andrea Tornielli, on the Publication of the Rescript of the Holy Father on the *Instruction on the Confidentiality of Legal Proceedings: Historic Decision, Fruit of the February Summit*,” with the Abolition of the Pontifical Secret for Cases of Sexual Abuse against Minors, Pope Francis Continues on the Path of Transparency,” 17 December 2019, <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217d.html> ; IDEM, “Interview of the Editorial Director, Andrea Tornielli, with Archbishop Charles Scicluna, Adjunct Secretary of the Congregation for the Doctrine of the Faith on the Occasion of the Publication of the Rescript of the Holy Father Francis concerning the *Instruction on the Confidentiality of Legal Proceedings: An Epochal Decision that Removes Obstacles and Impediments*,” 17 December 2019, <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/12/17/191217e.html> ; John P. BEAL, “Accountability and Transparency according to Canon and International Law: A Human Rights Perspective,” in *Periodica*, 109 (2020), 505-526; Matteo VISIOLI, “Confidenzialità e segreto pontificio,” in *Periodica*, 109 (2020), 447-491. See Justin GLYN, “Commentary on Instruction on the Confidentiality of Legal Proceedings,” in *The Canonist*, 10 (2019), 141-143; IDEM, “Less Than Meets the Eye: The Pontifical Secret and Analogous Provisions,” in *The Canonist*, 10 (2019), 37-46; and Ian WATERS, “The Law of Secrecy in the Latin Church,” in *The Canonist*, 7 (2016), 75-87.

<sup>76</sup> *Vademecum*, art. 30. This reflects the 6 December 2019 *Rescriptum*, art. 5: “The person who files the report, the person who alleges to have been harmed, and the witnesses shall not be bound by any obligation of silence with regard to matters involving the case.”



The *Vademecum* also remarks that “accusations, processes, and decisions” concerning the alleged clerical sexual abuse of a minor are subject to the secret of office. It adds that this “does not prevent persons reporting—especially if they also intend to inform the civil authorities—from making public their actions.”<sup>77</sup> Indeed, inasmuch as all forms of *notitiae de delicto* are not formal accusations, “it is possible to evaluate whether or not one is bound by the secret, always keeping in mind the respect for the good name of others.”<sup>78</sup>

#### 4.5 — Purpose of the Preliminary Investigation

The *Vademecum* states clearly that the preliminary investigation “is not a trial, nor does it seek to attain moral certitude as to whether the alleged events occurred.”<sup>79</sup> Instead, it has two purposes: (a) “to gather data useful for a more detailed examination of the *notitia de delicto*,” and (b) “to determine the plausibility of the report, that is, to determine that which is called *fumus delicti*, namely the sufficient basis both in law and in fact so as to consider the accusation as having the semblance of truth.”<sup>80</sup> The *Vademecum* elaborates:

- [The] preliminary investigation should gather detailed information about the *notitia de delicto* with regard to facts, circumstances, and imputability.
- It is not necessary at this phase to assemble complete elements of proof (e.g., testimonies, expert opinions), since this would be the task of an eventual subsequent penal procedure.
- It is important to reconstruct, to the extent possible:
  - (1) the facts on which the accusation is based;
  - (2) the number and time of the criminal acts;
  - (3) the circumstances in which these acts took place;
  - (4) general details about the alleged victims; and
  - (5) a preliminary evaluation of the eventual physical, psychological and moral harm inflicted.
- Care must be taken to determine any possible relation to the sacramental internal forum (see 2010 *Normae*, art. 24).
- Any other delicts attributed to the accused (cf. 2010 *Normae*, art. 8 § 2) can be added, together with as any indication of problematic facts emerging from his biographical profile.

<sup>77</sup> *Vademecum*, art. 47.

<sup>78</sup> *Vademecum*, art. 47; see art. 44.

<sup>79</sup> *Vademecum*, art. 33.

<sup>80</sup> *Vademecum*, art. 33.

- It can be useful to assemble testimonies and documents, of any kind or provenance (including the results of investigations or trials carried out by civil authorities), which may in fact prove helpful for substantiating and validating the plausibility of the accusation.
- It is likewise possible to indicate eventual exempting or aggravating factors, as provided for by law.
- It could also prove helpful to collect at this time testimonials of credibility regarding the complainants and the alleged victims.
- If other *notitia de delicto* become known, they must also be part of the same preliminary investigation.<sup>81</sup>

In some circumstances, the purpose of the preliminary investigation is achieved by other means, which makes the preliminary investigation unnecessary. The *Vademecum* identifies two such circumstances: (1) the admission of guilt by the accused cleric;<sup>82</sup> and (2) the notorious and indisputable fact of the delict “given, for example, the acquisition of civil proceedings.”<sup>83</sup>

#### 4.6 — Initiating the Preliminary Investigation

The preliminary investigation is conducted by the ordinary/hierarchy or another suitable person.<sup>84</sup> It begins and ends with a decree issued by the ordinary/hierarchy.<sup>85</sup> If he chooses to appoint an investigator, he will identify that person in the decree and explain that by law the investigator has the powers and obligations of an auditor.<sup>86</sup> The investigator cannot act as a judge in the case should a judicial penal process eventually begin (nor should the investigator be a delegate or assessor in an extrajudicial penal process).<sup>87</sup>

<sup>81</sup> *Vademecum*, arts. 34-35, reconfigured by this author.

<sup>82</sup> *Vademecum*, art. 37.

<sup>83</sup> *Vademecum*, art. 37. Concerning the ecclesiastical adoption of the civil investigations or trial, article 36 states: “the acquisition of the results of civil investigations (or of an entire trial before a tribunal of the state) could make the preliminary canonical investigation unnecessary. Due care must be taken, however, by those who must carry out the preliminary investigation to examine the civil investigation, since the criteria used in the latter (with regard, for example, to terms of prescription, the typology of the crime, the age of the victim, etc.) can vary significantly with respect to the norms of canon law. In these situations, too, it can be advisable, in case of doubt, to consult with the CDF.”

<sup>84</sup> *CIC*, c. 1717 § 1; *CCEO*, c. 1468 § 1.

<sup>85</sup> *CIC*, c. 1719; *CCEO*, c. 1470.

<sup>86</sup> *Vademecum*, art. 40; *CIC*, c. 1717 § 3; *CCEO*, c. 1468 § 3. The qualifications of an auditor are listed in *CIC*, canon 1428 §§ 1-2 and *CCEO*, canon 1093.

<sup>87</sup> *Vademecum*, art. 39; *CIC*, c. 1717 § 3; *CCEO*, c. 1468 § 3.

Certainly, the investigator can be a lay person.<sup>88</sup> In addition, the *Vademecum* recommends, though the law does not require it for the validity of the acts,<sup>89</sup> that the ordinary/hierarchy appoint a priest notary<sup>90</sup> “who assists the person conducting the preliminary investigation, for the purpose of ensuring the authenticity of the acts.”<sup>91</sup> The *Vademecum* comments that the law does not foresee the involvement of the promoter of justice in the preliminary investigation.<sup>92</sup>

#### 4.7 — Protection of Good Names and the Common Good

The law requires that care be taken to protect the good names of all persons involved in the preliminary investigation, so “that the report will not lead to prejudice, retaliation, or discrimination.”<sup>93</sup> Therefore, the investigator must “be particularly careful to take every possible precaution to this end, since the right to a good name is one of the rights of the faithful upheld by canons 220 *CIC* and 23 *CCEO*.”<sup>94</sup> The *Vademecum* adds, however, that these canons intend to protect against “illegitimate violations” of one’s good name.

It should be noted, however, that those canons protect that right from illegitimate violations. Hence, should the common good be endangered, the release of information about the existence of an accusation does not necessarily constitute a violation of one’s good name. Furthermore, the persons involved are to be informed that in the event of a judicial seizure or a subpoena of the acts of the investigation on the part of civil authorities, it will no longer be possible for the Church to guarantee the confidentiality of the depositions and documentation acquired from the canonical investigation.<sup>95</sup>

The *Vademecum* insists that any public statements be made with “great caution.”<sup>96</sup> They should be “brief and concise, avoiding clamorous announcements, refraining completely from any premature judgment about

<sup>88</sup> *Vademecum*, art. 39. See *CIC*, c. 228; *CCEO*, c. 408; *Vos estis*, art. 13.

<sup>89</sup> *Vademecum*, art. 42.

<sup>90</sup> *CIC*, c. 483 §2; *CCEO*, c. 253 §2.

<sup>91</sup> *Vademecum*, art. 41. See *CIC*, c. 1437 §2; *CCEO*, c. 1101 §2.

<sup>92</sup> *Vademecum*, art. 43. *CCEO*, canon 1469 §3, however, requires the hierarchy hear both the promoter of justice and the accused when he decides how to proceed before making a decision concerning the information gathered during the preliminary investigation. No corresponding requirement is found in the *CIC*.

<sup>93</sup> *Vademecum*, art. 44.

<sup>94</sup> *Vademecum*, art. 44.

<sup>95</sup> *Vademecum*, art. 44. See Ronny E. JENKINS, “Defamation of Character in Canonical Doctrine and Jurisprudence,” in *StC*, 36 (2002), 419-462.

<sup>96</sup> *Vademecum*, art. 45.

the guilt or innocence of the person accused (since this is to be established only by an eventual penal process aimed at verifying the basis of the accusation), and respecting any desire for privacy expressed by the alleged victims.”<sup>97</sup> All communications, public and private, must avoid “any affirmation ... that could constitute an anticipation of judgment on the merits of the facts.”<sup>98</sup>

#### 4.8 — Involvement of the Accused Cleric

The ordinary/hierarch will “decide if and when to inform the person being accused” of the allegation.<sup>99</sup> The law provides “no uniform criterion or explicit provision,”<sup>100</sup> so the *Vademecum* directs: “An assessment must be made of all the goods at stake: in addition to the protection of the good name of the persons involved, consideration must also be given, for example, to the risk of compromising the preliminary investigation or giving scandal to the faithful, and the advantage of collecting beforehand all evidence that could prove useful or necessary.”<sup>101</sup>

Although the law does not mandate that the accused cleric have the assistance of an advocate during this preliminary investigation, “[i]f he considers it helpful, however, he can be assisted by a patron of his choice.”<sup>102</sup> Further, by analogy to *CIC* canon 1728 § 2 and *CCEO* canon 1471 § 2, an “oath cannot be imposed on the accused person.”<sup>103</sup> During the preliminary investigation, the accused can be offered appropriate welcome, hearing, and support, as are also offered to the alleged victim and his/her family. This care, however, must “avoid giving the impression of wishing to anticipate the results of the process.”<sup>104</sup>

<sup>97</sup> *Vademecum*, art. 45.

<sup>98</sup> *Vademecum*, art. 46.

<sup>99</sup> *Vademecum*, art. 52, which describes this decision as “a particularly sensitive task.” *CCEO*, c. 1469 § 3 requires the hierarch to hear the accused and the promoter of justice before making a decision on the information gathered during the preliminary investigation.

<sup>100</sup> *Vademecum*, art. 53.

<sup>101</sup> *Vademecum*, art. 53.

<sup>102</sup> *Vademecum*, art. 54. This “patron” is designated by different terms in the various translations: *patrono* (Italian); *avocat* (French); *patrono* (Spanish); *defensor* (Portuguese); *Eidesleistung* (German); *obrońcy* (Polish). These have different precise canonical meanings, so a Latin original text would be welcomed to avoid ambiguity.

<sup>103</sup> *Vademecum*, art. 54. See *CIC*, cc. 1199-1204; *CCEO*, c. 895. Note that the *CCEO* has only one canon on oaths.

<sup>104</sup> *Vademecum*, art. 55. See Charles J. SCICLUNA, “The Rights of Victims in Canonical Penal Processes,” in *Periodica*, 109 (2020), 493-503.

#### 4.9 — Care for the Alleged Victim

The *Vademecum* reflects *Vos estis* when it insists that ecclesiastical authorities provide proper care for the alleged victim and his/her family. They persons are to be “treated with dignity and respect.”<sup>105</sup> They are to be offered “welcome, attentive hearing, and support, also through specific services, as well as spiritual, medical, and psychological help, as required by the specific case.”<sup>106</sup> It is also helpful to refer the alleged victim and his/ her family to any existing “state or ecclesiastical structures of information and support,” so that they can receive “advice, guidance, and assistance.”<sup>107</sup>

#### 4.10 — Administrative Restrictions on the Accused Cleric

*CIC* canon 1722 and *CCEO* canon 1473 identify precautionary measures which the ordinary/hierarchy can impose upon the accused cleric. The list is taxative, so other precautionary measures cannot be added. However, the ordinary/hierarchy is not required to impose *all* of the measures.<sup>108</sup> He can impose them during the preliminary investigation of an alleged *gravius delictum*.<sup>109</sup> They are imposed by a “singular precept, legitimately made known.”<sup>110</sup> They are also modified or revoked by a singular precept, and end at the end of the penal process, when they “cease to have legal effect.”<sup>111</sup>

The purpose of the precautionary measures is “to defend the good name of the persons involved and to protect the public good, as well as to avoid other factors (for example, the rise of scandal, the risk of concealment of future evidence, the presence of threats or other conduct meant to dissuade the alleged victim from exercising his or her rights, the protection of other possible victims).”<sup>112</sup> Everyone must understand that this measure is an

<sup>105</sup> *Vademecum*, art. 55.

<sup>106</sup> *Vademecum*, art. 55. See *Vos estis*, art. 5.

<sup>107</sup> *Vademecum*, art. 57, which adds: “The purpose of these [state or ecclesiastical] structures is purely that of advice, guidance, and assistance; their analyses do not in any way constitute canonical procedural decisions.”

<sup>108</sup> *Vademecum*, art. 59.

<sup>109</sup> 2010 *Normae*, art.19. For cases not involving *graviora delicta*, these precautionary measures can be imposed only during the penal process, not during the preliminary investigation. See John P. BEAL, “Administrative Leave: Canon 1722 Revisited,” in *StC*, 27 (1993), 293-320.

<sup>110</sup> *Vademecum*, art. 64 which refers to *CIC*, cc. 49ff, 1319; *CCEO*, cc. 1406, 1510ff.

<sup>111</sup> *Vademecum*, art. 65.

<sup>112</sup> *Vademecum*, art. 58.

“administrative act,” *not* a penalty.<sup>113</sup> It constitutes a “*prohibition* from the exercise of the [public] ministry.”<sup>114</sup> The *Vademecum* explains:

It should be clearly explained to the party in question that the measure is not penal in nature, lest he think that he has already been convicted and punished from the start. It must also be emphasized that precautionary measures must be revoked if the reason for them ceases and that they themselves cease with the conclusion of the eventual penal process. Furthermore, they can be modified (made more or less severe), if circumstances so demand. Still, particular prudence and discernment is urged in judging whether the reason that suggested them has ceased; nor is it excluded that—once revoked—they can be re-imposed.<sup>115</sup>

The *Vademecum* acknowledges that the ordinary/hierarchy also may impose “other disciplinary measures within his power, yet these cannot be strictly defined as ‘precautionary measures’.”<sup>116</sup> It expressly forbids “transferring the accused cleric from his office, region, or religious house, with the idea that distancing him from the place of the alleged crime or alleged victims constitutes a sufficient solution of the case.”<sup>117</sup> The “precautionary measures” can also be imposed on the accused during the penal process, judicial or extrajudicial.<sup>118</sup>

#### 4.11 — Duration of the Preliminary Investigation

The law is silent on the duration of the preliminary investigation, since numerous factors can shorten or lengthen the time period. The *Vademecum* comments: “It is recommended, for the sake of equity and a reasonable exercise of justice, that the duration of the preliminary investigation correspond to the purpose of the investigation, which is to assess the plausibility of the *notitia de delicto* and hence the existence of the *fumus delicti*.”<sup>119</sup>

<sup>113</sup> *Vademecum*, art. 61.

<sup>114</sup> *Vademecum*, art. 62, which adds: “It has been noted that the older terminology of *suspensio a divinis* is still frequently being used to refer to the prohibition of the exercise of ministry imposed on a cleric as a precautionary measure. It is best to avoid this term, and that of *suspensio ad cautelam*, since in the current legislation suspension is a penalty, and cannot yet be imposed at this stage.” It is more precise canonically to understand the precautionary measures of *CIC*, c. 1722 and *CCEO*, c. 1473 as prohibiting the exercise of *public* ministry.

<sup>115</sup> *Vademecum*, art. 61.

<sup>116</sup> *Vademecum*, art. 60.

<sup>117</sup> *Vademecum*, art. 63.

<sup>118</sup> *Vademecum*, art. 90, which refers to arts. 58-65. 2010 *Normae*, art. 19 provides: “the respective presiding judge may, at the request of the promotor of justice, exercise the same power of imposing the precautionary measures.”

<sup>119</sup> *Vademecum*, art. 66.

It adds: “An unjustified delay in the preliminary investigation may constitute an act of negligence on the part of ecclesiastical authority.”<sup>120</sup> Culpable negligence of power, ministry, office, or function is an ecclesiastical delict.<sup>121</sup>

#### 4.12 — Concluding the Preliminary Investigation

The ordinary/hierarch concludes the penal preliminary investigation with a decree.<sup>122</sup> If he has appointed an investigator, this person “is to consign all the acts of the investigation together with a personal evaluation of the results.”<sup>123</sup> Similarly, if the ordinary/hierarch who conducted the penal preliminary investigation is not the ordinary/hierarch of the place of the alleged delict, the former is to send the acts of the investigation to the latter.<sup>124</sup> When the preliminary investigation of alleged clerical sexual abuse of a minor is completed, the ordinary/hierarch is to “send, without delay, an authentic copy of the relative acts to the CDF.”<sup>125</sup> He is to send a “single copy” of the acts; “it is helpful if they are authenticated by a notary.”<sup>126</sup> If the ordinary/hierarch conducting the preliminary investigation is a major superior, the *Vademecum* directs:

In cases where the ordinary or hierarch who carried out the preliminary investigation is a major superior, it is best that he likewise transmit a copy of all documentation related to the investigation to the supreme moderator (or to the relative bishop in the case of institutes or societies of diocesan right), since they are the persons with whom the CDF will ordinarily communicate thereafter. For his part, the supreme moderator will send to the CDF his own *votum*, as above in [*Vademecum*, art.] 69.<sup>127</sup>

Accompanying these copies of the *acta* are to be the “Tabular Summary for Cases of *Delicta reservata*” found in the appendix of the *Vademecum*,<sup>128</sup> and the *votum* of the ordinary/ hierarch.<sup>129</sup> The *Vademecum* explains the content of the *votum*:

[The ordinary/hierarch] is to provide his own evaluation of the results of the investigation (*votum*) and to offer any suggestions he may have on how to

<sup>120</sup> *Vademecum*, art. 66.

<sup>121</sup> See *CIC*, c. 1378 § 2; *CCEO*, c. 1464 § 2.

<sup>122</sup> *Vademecum*, art. 68, which refers to *CIC*, canon 1719 and *CCEO*, canon 1470.

<sup>123</sup> *Vademecum*, art. 67.

<sup>124</sup> *Vademecum*, art. 71.

<sup>125</sup> *Vademecum*, art. 69, which refers to the 2010 *Normae*, art. 16.

<sup>126</sup> *Vademecum*, art. 72, which adds that the notary is “a member of the curia, unless a specific notary had been appointed for the preliminary investigation.”

<sup>127</sup> *Vademecum*, art. 70.

<sup>128</sup> See the APPENDIX to this study.

<sup>129</sup> *Vademecum*, art. 69.

proceed (if, for example, he considers it appropriate to initiate a penal procedure and of what kind; if he considers sufficient the penalty imposed by the civil authorities; if the application of administrative measures by the ordinary or hierarchy is preferable; if the prescription of the delict should be declared or its derogation granted).<sup>130</sup>

The ordinary/hierarchy is to forward to the CDF as quickly as possible “other elements related to the preliminary investigation or new accusations”<sup>131</sup> which emerge after the *acta* have been forwarded to the CDF. The CDF is also to be informed if the ordinary/hierarchy believes the preliminary investigation should be reopened in light of these new elements.<sup>132</sup> The original of the entire *acta* is maintained in the secret archive of the curia.<sup>133</sup>

### **5 — The Activities of the CDF in Response to the Acta of the Preliminary Investigation**

When the CDF receives the *acta* of the preliminary investigation, it assigns a protocol number to the case, which is to be used “in all further communication with the CDF.”<sup>134</sup> It communicates this protocol number to the ordinary/hierarchy or supreme moderator and, if appropriate, also to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (in the case of clerical members of institutes/societies), the Congregation for Eastern Churches (in the case of Eastern clerics), or the Congregation for the Evangelization of Churches (in the case of clerics belonging to territories subject to that dicastery).<sup>135</sup> Thereafter, the CDF examines the *acta* of the preliminary investigation and makes one of the following choices:<sup>136</sup>

- to archive the case
- to request a more thorough preliminary investigation

<sup>130</sup> *Vademecum*, art. 69.

<sup>131</sup> *Vademecum*, art. 75.

<sup>132</sup> *Vademecum*, art. 75.

<sup>133</sup> *Vademecum*, art. 73, which refers to *CIC*, canon 1719 and *CCEO*, canon 1470. See also *CIC*, cc. 489-490, *CCEO*, cc. 259-260.

<sup>134</sup> *Vademecum*, art. 76.

<sup>135</sup> *Vademecum*, art. 76.

<sup>136</sup> *Vademecum*, art. 77, reconfigured by this author.



- to impose non-penal disciplinary measures,<sup>137</sup> ordinarily by a penal precept<sup>138</sup>
- to impose penal remedies or penances, or warnings or public rebukes<sup>139</sup>
- to initiate a penal process
- to identify other means of pastoral response.

Finally, the CDF communicates its decision to the ordinary/hierarchy “with suitable instructions for its execution.”<sup>140</sup>

## 6 — *The Three Penal Processes*

The *Vademecum* identifies three penal processes: the decision of the Roman Pontiff, the juridical penal process, and the extrajudicial penal process.<sup>141</sup> In the judicial penal process and the extrajudicial penal process, one of three decisions is made: *constat*, *constat de non*, or *non constat*. These are explained in the *Vademecum*:

- *conviction* (“*constat*”), if with moral certainty the guilt of the accused is established regarding the delict ascribed to him. In this case, the decision must indicate the specific canonical sanction imposed or declared.
- *acquittal* (“*constat de non*”), if with moral certainty the innocence of the accused is established, inasmuch as no offence was committed, the accused did not commit the offence, the offence is not deemed a delict by the law or was committed by a person who is not imputable.

<sup>137</sup> *Vademecum*, art. 78 explains non-penal disciplinary measures: “Non-penal disciplinary measures are singular administrative acts (that is, acts of the ordinary or hierarchy, or of the CDF) by which the accused is ordered to do or to refrain from doing something. In these cases, limits are ordinarily imposed on the exercise of the ministry, of greater or lesser extent in view of the case, and also at times the obligation of residing in a certain place. It must be emphasized that these are not penalties, but acts of governance meant to ensure and protect the common good and ecclesial discipline, and to avoid scandal on the part of the faithful.”

<sup>138</sup> *Vademecum*, arts. 79-82 explain that penal precepts are treated in *CIC*, c. 1319 § 1 and *CCEO*, c. 1406 § 1; that *CCEO*, c. 1406 § 2 says a warning with threat of a penalty is equivalent to a penal precept; that the formalities of a penal precept are found in *CIC*, cc. 49ff and *CCEO*, cc. 1510ff; that a penal precept must identify clearly the penalty for non-compliance; that a penal precept cannot impose perpetual expiatory penalties (*CIC*, c. 1319 § 1) or the other exclusions mentioned in *CCEO*, c. 1406 § 1; and that a penal precept is subject to recourse in accord with the law.

<sup>139</sup> *Vademecum*, art. 83 which refers to *CIC*, cc. 1339, 1340 § 1, and *CCEO*, c. 1427.

<sup>140</sup> *Vademecum*, art. 77.

<sup>141</sup> *Vademecum*, art. 85.

- *dismissal* (“*non constat*”), whenever it has not been possible to attain moral certainty regarding the guilt of the accused, due to lack of evidence or to insufficient or conflicting evidence that the offence was committed, that the accused committed the offence, or that the delict was committed by a person who is not imputable.<sup>142</sup>

In addition to these three conclusions, it is possible “to provide for the public good or for the welfare of the person accused through appropriate warnings, penal remedies, and other means of pastoral solicitude.”<sup>143</sup>

The *Vademecum* devotes the greater part of its articles about the penal process to the extrajudicial penal process (arts. 91-141). One could presume that this is because many cases are resolved by means of this process, about which very brief legislation exists in each Code (*CIC*, c. 1720 and *CCEO*, cc. 1486-1487).

## 6.1 — Penal Decision of the Roman Pontiff

The *Vademecum* says that, in the gravest cases, the Supreme Pontiff can impose a penalty,<sup>144</sup> as explained in the 2010 *Normae*: “[The] Congregation for the Doctrine of the Faith may ... present the most grave cases [*casus gravissimos*] to the decision of the Roman Pontiff with regard to dismissal from the clerical state or deposition, together with dispensation from the law of celibacy, when it is manifestly evident that the delict was committed and after having given the guilty party the possibility of defending himself.”<sup>145</sup> The *Vademecum* reiterates that “even though the commission of the delict is manifestly evident, the accused be guaranteed the right of self-defence.”<sup>146</sup>

## 6.2 — The Judicial Penal Process

The *Vademecum* says that those involved in the judicial penal process should refer to the relevant provisions of the *CIC*, the *CCEO*, the 2010 *Normae*

<sup>142</sup> *Vademecum*, art. 84.

<sup>143</sup> *Vademecum*, art. 84 which refers to *CIC*, c. 1348.

<sup>144</sup> *Vademecum*, art. 86.

<sup>145</sup> 2010 *Normae*, art. 21 § 2, 2°.

<sup>146</sup> *Vademecum*, art. 86. See Lucien R. MILLETTE, “An Analysis of the Preliminary Investigation in Light of the Rights of the Accused,” in *Jur*, 75 (2015), 109-195; John A. RENKEN, “The Canonical Rights of Those Accused of the Delict of Sexual Abuse,” in *StC*, 54 (2020), 221-264; IDEM, “Les droits canoniques des autours d’abus,” in Stéphane JOULAIN, Karlijn DEMASURE, and Jean-Guy NADEAU (eds.), *L’Église déchisée. Comprendre et traverser la crise des abus sexuels sur mineurs*, Paris, Bayard, 2021, 210-226.

(arts. 22-31), and the *Vademecum* arts. 8-15, 18-19, 21 §1.<sup>147</sup> The judicial penal process in *graviora delicta* cases is conducted by the CDF or a lower tribunal.<sup>148</sup> The tribunal is always collegial, composed of three judges.<sup>149</sup>

Appeal against a decision can be lodged by the accused or the promoter of justice.<sup>150</sup> The judicial penal process does not require a double conforming sentence. Therefore, a decision rendered by a sentence in second instance becomes *res iudicata*.<sup>151</sup> It can be challenged only by a *restitutio in integrum*<sup>152</sup> or a complaint of nullity.<sup>153</sup> When the decision is reached in the judicial penal process, “a specific letter of execution is sent to all interested parties.”<sup>154</sup>

### 6.3 — The Extrajudicial Penal Process

The extrajudicial penal process “abbreviates the formalities called for in the judicial [penal] process, for the sake of expediting the course of justice without eliminating the procedural guarantees demanded by a fair trial.”<sup>155</sup> Canon 1342 addresses issues related to the extrajudicial penal process.

Canon 1342—§1. Whenever just causes preclude a judicial process from taking place, a penalty can be imposed or declared by extrajudicial decree, observing canon 1720, especially in what pertains to the right of defense and to moral certitude in the mind of the one who issues the decree according to the norm of canon 1608. Penal remedies and penances can be applied by decree in any case.<sup>156</sup>

§2. Perpetual penalties cannot be imposed or declared by decree, nor can penalties which the law or precept establishing them prohibits to be applied by decree.

§3. What a law or precept states about a judge in regard to the imposition or declaration of a penalty in a trial is to be applied to a superior who

<sup>147</sup> *Vademecum*, art. 87.

<sup>148</sup> *Vademecum*, art. 89, which refers to 2010 *Normae*, arts. 16-17.

<sup>149</sup> *Vademecum*, art. 88. This reflects *CIC*, c. 1425 § 1, 2° a); *CCEO*, c. 1084 § 1, 3°.

<sup>150</sup> *Vademecum*, art. 88, which refers to 2010 *Normae*, art. 26 § 2. See Tiziano VANZETTO, “L’appello da parte del promotore di giustizia nella cause penali (can. 1727 § 2),” in *QDE*, 30 (2017), 68-74.

<sup>151</sup> *Vademecum*, art. 88, which refers to 2010 *Normae*, art. 28.

<sup>152</sup> *Vademecum*, art. 88, which adds “provided elements are produced that make its injustice clear” and refers to *CIC*, c. 1645 and *CCEO*, c. 1326.

<sup>153</sup> *Vademecum*, art. 88, which refers to *CIC*, cc. 1619ff and *CCEO*, c. 1302ff.

<sup>154</sup> *Vademecum*, art. 89; see art. 93, which says a letter of execution is sent to the interested parties in the extrajudicial penal process as well.

<sup>155</sup> *Vademecum*, art. 91, which refers to *CIC*, c. 221 and *CCEO*, c. 24.

<sup>156</sup> The 2021 revision of this canon inserts: “observing can. 1720, especially in what pertains to the right of defense and to moral certitude in the mind of the one who issues the decree

imposes or declares a penalty by extrajudicial decree unless it is otherwise evident and it does not concern precepts which pertain only to the manner of proceeding.

The 2010 *Normae* explain that *graviora delicta* cases reserved to the CDF are typically to be tried through the judicial penal process.<sup>157</sup> Nonetheless, the same norms permit the CDF to decide in individual cases, *ex officio* or when requested by an ordinary/hierarchy, to employ the extrajudicial penal process.<sup>158</sup> The extrajudicial penal process is conducted by the CDF or a lower instance (e.g., the ordinary/hierarchy of the accused, or third parties assigned by the CDF, perhaps at the request of the ordinary/hierarchy).<sup>159</sup> When the decision is reached, “a specific letter of execution is sent to all interested parties.”<sup>160</sup>

The *Vademecum* remarks that the extrajudicial penal process follows slightly different formalities in the *CIC* and the *CCEO*. After a lengthy treatment of the extrajudicial penal process in the *CIC* (arts. 91-129), the *Vademecum* identifies the peculiarities of the *CCEO* (arts. 130-139). If there is a question of which Code is to be used in a particular case, the CDF will make a clarifying decision, to which all must “strictly adhere.”<sup>161</sup>

according to the norm of can. 1608.” Thus, the Legislator underscores the right of self-defense of the accused, and the requirement of moral certitude in order for the ordinary to overturn the presumption of the innocence of the accused (see c. 1321 § 1).

<sup>157</sup> 2010 *Normae*, art. 21 § 1. Archbishop Giacomo Morandi discusses the extrajudicial penal process: “It is a procedure provided for by the two Codes of Canon Law in force. It is a more expeditious route. At the conclusion of the extrajudicial penal process, the Ordinary (or one of his delegates), assisted by two assessors, comes to a decision on whether or not the accused is guilty and (if guilty, with moral certainty) on the proportionate penalty to be imposed. There are pros and cons in this procedure, which is also known as an ‘administrative’ procedure. The extrajudicial path is pursued when, for example: the facts are clear; the criminal activity reported is already confirmed by the accused; the Ordinary asks that this be done for well-founded reasons; the Congregation considers that it is appropriate on the basis of the particular circumstances (qualified personnel, geography, timeliness, etc.). Naturally, the right of defense of the accused must always be absolutely guaranteed. For this reason, also, the extrajudicial penal process in Latin law provides for up to three possible degrees of appeal, in order to ensure as much as possible the objectivity of the judgment.” Morandi, “A Manual to Explain.”

<sup>158</sup> *Vademecum*, art. 92, which refers to 2010 *Normae*, art. 21 § 2, 1° and mentions the derogation from *CIC*, c. 1720 and *CCEO*, c. 1486.

<sup>159</sup> *Vademecum*, art. 93.

<sup>160</sup> *Vademecum*, art. 93; see art. 89, which says a letter of execution is sent to the interested parties in the judicial penal process as well.

<sup>161</sup> *Vademecum*, art. 94, which acknowledges that confusion concerning the appropriate Code may arise “for example, in the case of clerics of the Latin rite who work in Eastern Churches or clerics of an Eastern rite who are active in Latin rite circumscriptions.” The Italian version of the *Vademecum* explains that adherence to the CDF decision is to be done *scrupolosamente*.

### 6.3.1 — *The extrajudicial penal process in the CIC*

The *Vademecum* addresses various aspects of the extrajudicial penal process which is described thus in the *CIC*:

Canon 1720—If the ordinary thinks that the matter must proceed by way of extrajudicial decree:

- 1° he is to inform the accused of the accusation and the proofs, giving an opportunity for self-defense, unless the accused neglected to appear after being properly summoned;
- 2° he is to weigh carefully all the proofs and arguments with two assessors;
- 3° if the delict is certainly established and a criminal action is not extinguished, he is to issue a decree according to the norm of canons 1342-1350, setting forth the reasons in law and in fact at least briefly.

The *Vademecum* considers the following topics: the appointment of officials; the involvement of the accuser; summoning the accused; the advocate and procurator for the accused; the notification session; the defense phase; the conclusion.

*Appointment of Officials.* The CDF may conduct the extrajudicial penal process.<sup>162</sup> If the CDF assigns an ordinary to conduct the process, the ordinary first decides to preside over the process personally or through a delegate.<sup>163</sup> The ordinary then appoints two assessors<sup>164</sup> (who assist the ordinary or his delegate during the “evaluative phase”) and a notary.<sup>165</sup> These persons are appointed by a decree, and they must take the oath to fulfill their task faithfully and to observe secrecy; this oath is to be recorded in the acts.<sup>166</sup> The Latin Code does not involve a promoter of justice in the extrajudicial penal process.<sup>167</sup>

*Involvement of the Accuser.* Because this is a penal process, the accuser is not required to take part. Indeed, the accuser has exercised his/her right “by

<sup>162</sup> *Vademecum*, art. 129 explains that, if the CDF conducts the extrajudicial penal process, the formalities of arts. 91-128 pertain to the CDF “without prejudice to its right to request, if necessary, the cooperation of lower instances.”

<sup>163</sup> *Vademecum*, art. 95. The extrajudicial penal process is an act of ordinary executive power of governance (*CIC*, c. 135; *CCEO*, c. 985) and, as such, it can be delegated unless the law expressly provides otherwise (*CIC*, c. 137 § 1; *CCEO*, c. 988 § 1).

<sup>164</sup> *Vademecum*, art. 95, which refers to *CIC*, cc. 1424 and 1448.

<sup>165</sup> *Vademecum*, art. 95, which refers to art. 41.

<sup>166</sup> *Vademecum*, art. 96. See *CIC*, c. 1454 which speaks of the *iusiurandum* (oath) to be taken by all who constitute a tribunal or who assist in it; *CCEO*, c. 1112 speaks of a *promissio* (promise, not an oath). The *Vademecum* applies this discipline to the extrajudicial penal process.

<sup>167</sup> *Vademecum*, art. 95. *CCEO*, c. 1496 § 1, 2° requires the presence of the promoter of justice in the extrajudicial penal process.

contributing to the formation of the accusation and the gathering of proof. Thereafter, the accusation is carried forward by the ordinary of his delegate.”<sup>168</sup>

*Summoning the Accused.* The process begins when the ordinary or his delegate summons the accused to the process by a decree. The *Vademecum* indicates the content of the decree:

- the clear indication of who is being summoned
- the place and time at which he must appear
- the *two* purposes for which he is being summoned: (1) to take note of the accusation (which the text of the decree is to set forth briefly) and of the corresponding proofs (which the decree need not list), and (2) to exercise his right of self-defence.<sup>169</sup>

If the accused refuses or fails to appear, the ordinary or his delegate can issue a second summons, but this is not mandatory.<sup>170</sup> Indeed, the accused must be warned that the process will proceed despite his absence; such notification should be given in the first summons. A failure or refusal to appear is to be noted in the acts of the process, which “is to continue *ad ulteriora*,”<sup>171</sup> without the active participation of the accused.

*Advocate and Procurator for the Accused.* The law on the extrajudicial penal process does not explicitly require an advocate or procurator for the accused. Nonetheless, the *Vademecum* explains that “it is most fitting that the accused ... be assisted by a procurator and/or advocate, either of his own choice or, otherwise, appointed *ex officio*.”<sup>172</sup> Furthermore, a suitable and authentic mandate<sup>173</sup> for the procurator and/or advocate must be presented to the ordinary or his delegate before the “notification session,” in which the accusations and proofs are made known. This presentation of the mandate will verify that the requirements of the law have been met.<sup>174</sup>

<sup>168</sup> *Vademecum*, art. 114.

<sup>169</sup> *Vademecum*, art. 97, reconfigured by this author.

<sup>170</sup> *Vademecum*, art. 99.

<sup>171</sup> *Vademecum*, art. 100.

<sup>172</sup> *Vademecum*, art. 98 which refers to *CIC*, cc. 1723 and 1481 §§ 1-2. These canons indicate that an advocate is always required in the *judicial* penal process; they do not mandate the involvement of a procurator.

<sup>173</sup> See *CIC*, c. 1484 § 1. The English version of the *Vademecum*, art. 98 speaks of a “procuratorial mandate.” This is rendered in other languages: *mandato procuratorio* (Italian); *mandat de procureur* (French); *mandato procuratorio* (Spanish); *procuração* (Portuguese); *Vollmacht* (German); *pełnomocnictwem* (Polish). Inasmuch as the person is not only a procurator but also an advocate, it would be more legally precise to speak of “the authentic mandate of the procurator and advocate.”

<sup>174</sup> *Vademecum*, art. 98, which refers to *CIC*, c. 1483: “The procurator and advocate must have attained the age of majority and be of good reputation; moreover, the advocate must be a

*The “Notification Session.”* The “notification session” of the extrajudicial penal process occurs when the accusations and proofs are revealed to the accused and his advocate (if present), including the *acta* of the preliminary investigation.<sup>175</sup> The purpose of this notification is to give the accused the possibility of self-defence.<sup>176</sup> The *Vademecum* discusses “accusation” and “proofs” as follows:

“Accusation” refers to the delict that the alleged victim or other person claims to have occurred, as this has emerged from the preliminary investigation. Setting forth the accusation means informing the accused of the delict attributed to him and any attendant details (for example, the place where it occurred, the number and eventual names of the alleged victims, the circumstances).<sup>177</sup>

“Proofs” are all those materials collected during the preliminary investigation and any other materials acquired: first, the record of the accusations made by the alleged victims; then pertinent documents (e.g., medical records; correspondence, even by electronic means; photographs; proofs of purchase; bank records); statements made by eventual witnesses; and finally any expert opinions (medical, including psychiatric, psychological, graphological) that the person who conducted the investigation may have deemed appropriate to accept or have carried out. Any rules of confidentiality imposed by civil law should be observed.<sup>178</sup>

All the above are referred to as “proofs” because, despite having been collected in the phase prior to the process, from the moment the extrajudicial process is opened, they automatically become a body of evidence.<sup>179</sup>

If either the accusation or proofs involve the sacrament of penance, the name of the alleged victim must not be indicated to the accused, “unless the accuser has expressly consented otherwise.”<sup>180</sup>

Catholic unless the diocesan bishop permits otherwise, a doctor in canon law or otherwise truly expert, and approved by the same bishop.” The Code does not require the *procurator* to receive the approval of the diocesan bishop.

<sup>175</sup> *Vademecum*, art. 101.

<sup>176</sup> *Vademecum*, art. 104 which refers to *CIC*, c. 1720, 1°.

<sup>177</sup> *Vademecum*, art. 105.

<sup>178</sup> *Vademecum*, art. 106.

<sup>179</sup> *Vademecum*, art. 107. *CIC*, c. 1718 § 1-2 refers to that which is gathered during the preliminary investigation as “elements” (*elementa*) not “proofs” (*probationes*).

Archbishop Giacomo Morandi comments about the assessment of evidence in the penal process: “We use trial tools which are commonly employed to verify the reliability of evidence. Many crimes, not only those in question, are committed without witnesses. But that does not mean that we cannot arrive at certainty. There are procedural tools that allow this: the reliability of the persons involved, the consistency of the facts declared, the possible seriality of the crimes, the presence of documents containing evidence, etc. It must be said that on several occasions the accused, aware in conscience of the evil committed, admits to it in court.” Morandi, “A Manual to Explain.”

<sup>180</sup> *Vademecum*, art. 102 which refers to 2010 *Normae*, art. 24.

During any stage of the extrajudicial penal process, the ordinary or his delegate can request additional proofs. The accused can also make this request during the “defence phase” of the process. Any new proofs will be shared with the accused during that defence phase. If new elements of accusation or proofs have been found at the request of the defence, these will be presented to the accused during a new session; otherwise, these new elements will be treated as “further evidence for the defence.”<sup>181</sup> All those involved in the notification session are to be informed of the obligation to respect the secret of office.<sup>182</sup> The assessors are not required to be present at the notification session.<sup>183</sup>

*The Defense Phase.* In the defense phase, the accused cleric is given the opportunity to defend himself against the accusations and proofs. He is not bound to admit the delict, nor can he be obliged to take an oath to speak the truth.<sup>184</sup> The accused may request further proofs.<sup>185</sup> His argument can employ “all legitimate means” (e.g., witnesses, documents, or expert opinions).<sup>186</sup> The discretionary power of the judge in contentious trials is to be applied in admitting these proofs, “in particular, the gathering of statements of eventual witnesses.”<sup>187</sup> Certainly, when necessary, the ordinary or his delegate will assess the credibility of those taking part in the process.<sup>188</sup> Indeed, he must consider the credibility of the accuser in matters involving the sacrament of penance.<sup>189</sup> The *Vademecum* explains that the argument for the defense can be presented in two ways: (1) “it can be accepted in session with a specific statement signed by all present (in particular by: the ordinary or his delegate; the accused and his advocate, if any; the notary);” or (2) “through the setting of a reasonable time limit within which the defence can be presented in

<sup>181</sup> *Vademecum*, art. 108.

<sup>182</sup> *Vademecum*, art. 101.

<sup>183</sup> *Vademecum*, art. 103.

<sup>184</sup> *Vademecum*, art. 110, which refers to *CIC*, c. 1728 §2, which says the same about the accused during the judicial penal process.

<sup>185</sup> *Vademecum*, art. 108.

<sup>186</sup> *Vademecum*, art. 111.

<sup>187</sup> *Vademecum*, art. 112. A note to this article states: “By analogy with *CIC*, c. 1527—§ 1. Proofs of any kind which seem useful for adjudicating the case and are licit can be brought forward.”

<sup>188</sup> *Vademecum*, art. 113. A note to this article states: “By analogy with canon 1572 *CIC*—In evaluating testimony, the judge, after having requested testimonial letters if necessary, is to consider the following: 1) what the condition or reputation of the person is; 2) whether the testimony derives from personal knowledge, especially from what has been seen or heard personally, or whether from opinion, rumor, or hearsay; 3) whether the witness is reliable and firmly consistent or inconsistent, uncertain, or vacillating; 4) whether the witness has co-witnesses to the testimony or is supported or not by other elements of proof.”

<sup>189</sup> *Vademecum*, art. 113, which refers to 2010 *Normae*, art. 24 §2, which requires the same critique of the accuser’s credibility in the matter of the sacrament of penance.



writing to the ordinary or his delegate.”<sup>190</sup> The argument is always to be recorded or presented *in writing*.

*The Conclusion.* When the arguments and proofs have been gathered and the accused has been given the opportunity for self-defence, the ordinary or his delegate gives the file to the assessors, “granting them a suitable time for study and personal evaluation” and reminding them of their obligation to observe the secret of office.<sup>191</sup> In a decree, he asks them to provide, “within a certain reasonable time limit, their evaluation of the proofs and the arguments of the defence.”<sup>192</sup> In the same decree, he may invite the assessors to a meeting “to facilitate analysis, discussion, and debate. For such a session, which is optional but recommended, no particular juridical formalities are foreseen.”<sup>193</sup> It is helpful for the assessors to put their opinions into writing to assist in drafting the final decree of the extrajudicial penal process.<sup>194</sup> Likewise, if the evaluation of the proofs and the self-defence occurs in a joint session, it is recommended that minutes of the interventions and discussions are signed by the participants. Such writings are subject to the secret of office: they “are not to be made public.”<sup>195</sup>

When the delict is demonstrated with certainty, the ordinary or his delegate issues a decree which closes the extrajudicial penal process and imposes “the penalty, penal remedy, or penance that he considers most suitable for the reparation of scandal, the reestablishment of justice, and the amendment of the guilty party.”<sup>196</sup> If the ordinary intends to impose a perpetual expiatory penalty,<sup>197</sup> he must have a prior mandate of the CDF granting a derogation from the norm of canon 1342 § 2, which says that a perpetual penalty cannot be imposed by a decree.<sup>198</sup>

The conclusion of the extrajudicial penal process is a “decree,” not a “sentence” which is issued at the end of a judicial process.<sup>199</sup> The decree is signed by the ordinary or his delegate and authenticated by a notary; it is not signed by the assessors, since it is “a personal act” of the ordinary or his

<sup>190</sup> *Vademecum*, art. 109.

<sup>191</sup> *Vademecum*, art. 116.

<sup>192</sup> *Vademecum*, art. 115 which refers to *CIC*, c. 1720, 2°.

<sup>193</sup> *Vademecum*, art. 115.

<sup>194</sup> *Vademecum*, art. 117.

<sup>195</sup> *Vademecum*, art. 118.

<sup>196</sup> *Vademecum*, art. 119 which refers to *CIC*, c. 1720, 3°. See *CIC*, cc. 1311 § 2; 1341; 1343; 1345; 695 § 2.

<sup>197</sup> *Vademecum*, art. 121 states: “The list of perpetual penalties is solely that found in *CIC*, c. 1336 § 1, along with the caveats contained in *CIC*, cc. 1337 and 1338.”

<sup>198</sup> *Vademecum*, art. 120 which refers to 2010 *Normae*, art. 21 § 2, 1°.

<sup>199</sup> *Vademecum*, art. 122.

delegate.<sup>200</sup> The *Vademecum* offers guidelines on the formation of the decree, which is to observe the general formalities of every decree.<sup>201</sup>

- [The] penal decree must cite in summary fashion the principal elements of the accusation and the development of the process, but above all it must set forth at least briefly the reasons for the decision, both in law (listing, that is, the canons on which the decision was based—for example, those that define the delict, those that define possible mitigating, exempting, or aggravating circumstances—and, however concisely, the juridical logic that led to the decision to apply them) and in fact.<sup>202</sup>
- The statement of reasons in fact is clearly the more difficult, since the author of the decree must set forth the reasons which, by comparing the matter of the accusation and the statements of the defence (which he must summarize in his exposition), led him to certainty concerning the commission or non-commission of the delict, or the absence of sufficient moral certainty.<sup>203</sup>
- Since not everyone possesses a detailed knowledge of canon law and its formal language, a penal decree should be concerned with explaining the reasoning behind the decision, rather than being concerned about precise, detailed terminology. Where appropriate, competent persons may be called upon for assistance in this regard.<sup>204</sup>

“The notification of the entire decree (therefore not simply the dispositive part)” must be done in proper form and by the legitimate means prescribed.<sup>205</sup> It must be made known “in its entirety to the accused. The notification must be made to his procurator, if he has one.”<sup>206</sup>

An authentic copy of the *acta* of the extrajudicial penal process and of the notification of the concluding decree must be sent to the CDF.<sup>207</sup> The procedural acts and the decision are subject to the secret of office: “All taking part in the process, in any capacity, should be constantly reminded of this.”<sup>208</sup>

<sup>200</sup> *Vademecum*, art. 123.

<sup>201</sup> *Vademecum*, art. 124, which refers to *CIC*, cc. 48-56 on the contents of every decree.

<sup>202</sup> *Vademecum*, art. 124.

<sup>203</sup> *Vademecum*, art. 125.

<sup>204</sup> *Vademecum*, art. 126.

<sup>205</sup> *Vademecum*, art. 127, which refers to *CIC*, cc. 54-56.

<sup>206</sup> *Vademecum*, art. 141.

<sup>207</sup> *Vademecum*, art. 128.

<sup>208</sup> *Vademecum*, art. 140, which refers to art. 47. The title before art. 140 in the Italian mistakenly mentions “*il segreto pontificio*” (rather than “*il segreto di ufficio*,” which it correctly uses in art. 140).

### 6.3.2 — *The extrajudicial penal process in the CCEO*

The *Vademecum* acknowledges that the formalities of the extrajudicial penal process are slightly different in the two Codes, so it is important to understand which Code guides each individual process.<sup>209</sup> In articles 130-139, it identifies those aspects of the extrajudicial penal process unique to the *CCEO*:<sup>210</sup>

Canon 1486—§ 1. For the validity of the decree that imposes a penalty, it is required that:

- 1° the accused be notified of the accusation as well as the proofs and be given the opportunity of fully exercising the right of self-defense, unless the accused neglected to appear after being cited in accord with the norm of law;
- 2° an oral discussion be held between the hierarch or his delegate and the accused with the promoter of justice and a notary present;
- 3° it be explained in the decree itself the reasons on fact and law on which the penalty is based.

§ 2. However, the penalties mentioned in canon 1426 § 1<sup>211</sup> can be imposed without this procedure, provided their acceptance by the offender is established in writing.

Canon 1487—§ 1. A recourse against a decree that imposes a penalty can be introduced before the competent higher authority within ten useful days after the decree has been intimated.

§ 2. This recourse suspends the force of the decree.

§ 3. There is no further recourse against the decision of the higher authority.

The *Vademecum* insists: “above all ... under pain of invalidity of the penal decree,” the prescription of *CCEO* canon 1486 must be observed strictly.<sup>212</sup> It presents the specifics about the extrajudicial penal process in the *CCEO*:

- there is no mention of assessors, but the presence of the promoter of justice is required<sup>213</sup>
- the notification session on the accusation and proofs must occur “with the obligatory presence of the promoter of justice and the notary”<sup>214</sup>

<sup>209</sup> *Vademecum*, art. 94.

<sup>210</sup> *Vademecum*, art. 131.

<sup>211</sup> *CCEO*, c. 1426 § 1 states: “Unless another penalty is determined by law, according to the ancient traditions of the Eastern Churches, penalties can be imposed that require some serious work of religion or piety or charity to be performed, such as certain prayers, a pious pilgrimage, special fast, alms, spiritual retreats.” Compare *CIC*, c. 1340.

<sup>212</sup> *Vademecum*, art. 131.

<sup>213</sup> *Vademecum*, art. 132.

<sup>214</sup> *Vademecum*, art. 133.

- the notification session and the defence presentation “take place solely with oral arguments. Nevertheless, this does not exclude, for such arguments, the defence being presented in writing.”<sup>215</sup>
- special “attention should be given to the question whether, on the basis of the gravity of the delict, the penalties listed in *CCEO* canon 1426 § 1 are indeed adequate for achieving the provisions of *CCEO* canon 1401.”<sup>216</sup> *CCEO* canons 1429-1430 are to be observed when choosing the penalty<sup>217</sup>
- the hierarch or his delegate will recall that the prohibitions of *CCEO* canon 1402 § 2 are abrogated; therefore, he can impose a perpetual expiatory penalty by decree only with the prior mandate of the CDF<sup>218</sup>
- the criteria in the *Vademecum*, arts. 119-126 are to be followed in composing the extrajudicial penal decree<sup>219</sup>
- the notification of the extrajudicial penal decree will be in the form which conforms to *CCEO*, canon 1520.<sup>220</sup>

Finally, the *Vademecum* comments that all other aspects of the extrajudicial penal process in the Eastern Churches follow what has been stated in the *Vademecum* for the Latin Church, “including the possibility that the process will take place in the CDF.”<sup>221</sup>

## **7 — After the Conclusion of the Penal Process**

As mentioned earlier, the *Vademecum* identifies three possible penal processes: the decision of the Supreme Pontiff, the judicial penal process, and the extrajudicial penal process.<sup>222</sup> When the penal process is completed, different possibilities are available to the parties involved, depending on the process involved.<sup>223</sup> Any appeals or recourses have suspensive effect on the penalty.<sup>224</sup> Indeed, since the penalty is suspended, “and things return to the phase analogous to that prior to the process, precautionary measures remain in force.”<sup>225</sup>

<sup>215</sup> *Vademecum*, art. 134, which refers to *CCEO*, c. 1486 § 1, 2°.

<sup>216</sup> *Vademecum*, art. 135.

<sup>217</sup> *Vademecum*, art. 135.

<sup>218</sup> *Vademecum*, art. 136, which refers to 2010 *Normae*, art. 21 § 2, 1°.

<sup>219</sup> *Vademecum*, art. 137.

<sup>220</sup> *Vademecum*, art. 138.

<sup>221</sup> *Vademecum*, art. 139.

<sup>222</sup> *Vademecum*, art. 85.

<sup>223</sup> *Vademecum*, art. 142.

<sup>224</sup> *Vademecum*, art. 148, which refers to *CIC*, c. 1353 and *CCEO*, cc. 1319, 1487 § 2.

<sup>225</sup> *Vademecum*, art. 149, which refers to arts. 58-65.

### 7.1 — Penal Decision of the Roman Pontiff

The penal decision may be made by the Roman Pontiff. If so, no appeal or recourse is admitted.<sup>226</sup>

### 7.2 — The Judicial Penal Process

If the penal decision was made through the judicial penal process, three legal challenges exist: complaint of nullity, *restitutio in integrum*, and appeal.<sup>227</sup> The only appellate tribunal is that of the CDF.<sup>228</sup> Appeal of *graviora delicta* cases has a peremptory time limit of *one month*.<sup>229</sup>

### 7.3 — The Extrajudicial Penal Process

If the penal decision was made through the extrajudicial penal process, recourse can be made against the decree in accord with the law.<sup>230</sup> The procedures for recourse vary in the *CIC* and the *CCEO*.<sup>231</sup>

*Recourse in the CIC.* One wishing to lodge recourse against a penal decree first seeks its revocation or emendation from its author (i.e., the ordinary or his delegate) within the peremptory time limit of *ten* useful days, computed from the day of the legitimate notification of the penal decree.<sup>232</sup> Within *thirty* days of receiving the petition, the author can: (1) amend the decree (“but before proceeding in this case, it is best to consult the CDF immediately”); (2) reject the petition; or (3) not respond.<sup>233</sup> Thereafter, against the author’s amended decree, rejection, or silence, the one lodging recourse can apply to the CDF, whether directly, through the author of the decree, or through a procurator. This recourse to the CDF

<sup>226</sup> *Vademecum*, art. 143, which refers to 2010 *Normae*, art. 21 § 2, 2° and *CIC*, c. 333 § 3 and *CCEO*, c. 45 § 3. See art. 86.

<sup>227</sup> *Vademecum*, art. 144.

<sup>228</sup> *Vademecum*, art. 145, which refers to 2010 *Normae*, art. 20, 1°.

<sup>229</sup> *Vademecum*, art. 146, which notes that the time limit has been modified by 2010 *Normae*, art. 28, 2°. This is computed according to *CIC*, c. 202 § 1 and *CCEO*, c. 1545 § 1. For other cases, *CIC*, c. 1630 § 1 and *CCEO*, c. 1311 § 1 establish a peremptory period for appeal of fifteen days from the notice of publication of the sentence.

<sup>230</sup> *Vademecum*, art. 147, which refers to *CIC*, c. 1734ff and *CCEO*, c. 1487. See *Vademecum*, arts. 150-156.

<sup>231</sup> *Vademecum*, art. 150.

<sup>232</sup> *Vademecum*, art. 151, which refers to *CIC*, c. 1734.

<sup>233</sup> *Vademecum*, art. 152, which refers to *CIC*, c. 1735.

must be done within the peremptory period of *fifteen* useful days.<sup>234</sup> If the recourse to the CDF is presented to the author of the decree, the author must transmit it to the CDF.<sup>235</sup> After the CDF receives the recourse (whether directly from the accused or through the author of the decree), the author of the decree will await any instructions or requests from the CDF, which always will inform him about the CDF's examination of the recourse.<sup>236</sup>

*Recourse in the CCEO.* The procedure for recourse in the CCEO is simple. It requires that the recourse be sent to the CDF within *ten* useful days from the notification of the decree.<sup>237</sup> The author of the decree will “await instructions or requests from the CDF, which will inform him about the CDF's examination of the recourse. If the author is the ordinary, he must take note of the suspensive effect of the [recourse].”<sup>238</sup>

## 8 — Other Related Issues

The final section of the *Vademecum* addresses six issues related to the *gravius delictum* of sexual abuse of a minor by a cleric.

### 8.1 — The Accused's Petition for Dispensation from Clerical Obligations<sup>239</sup>

As soon as he is aware of the *notitia de delicto*, the accused cleric can petition for a dispensation from all obligations of the clerical state, including celibacy and religious vows. The ordinary/hierarch must clearly inform the

<sup>234</sup> *Vademecum*, art. 153, which refers to *CIC*, c. 1737 §§ 1-2.

<sup>235</sup> *Vademecum*, art. 154, which refers to *CIC*, c. 1737 § 1.

<sup>236</sup> *Vademecum*, art. 154.

<sup>237</sup> *Vademecum*, art. 155 which refers to *CCEO*, c. 1487 § 1.

<sup>238</sup> *Vademecum*, art. 156 which refers to art. 148. Note that the English version here mistakenly speaks of “the suspensive effects of the *appeal*” rather than “the suspensive effects of the *recourse*.”

<sup>239</sup> *Vademecum*, art. 157. Archbishop Giacomo Morandi comments about the petition for this dispensation by the accused “when a cleric recognizes the crime and his unfitness to continue in ministry, he can ask to be dispensed. Thus, he remains a priest (the Sacrament cannot be revoked or lost) but no longer a cleric: he leaves the clerical state not by resigning but by making a conscious request addressed to the Holy Father. This is a different way of achieving the same result regarding the juridical condition of the person: a former cleric who can never again present himself as a minister of the Church.” MORANDI, “A Manual to Explain.”

See also Jordi BERTOMEU FARNÓS, “La praxis de la CDF sobre la dispensa de las obligaciones clericales: El n. 157 del *Vademécum*,” in *Ius canonicum*, 61/122 (2021), 1-34.

accused cleric of this *right*. If the cleric chooses to seek this dispensation, he presents a “suitable petition” to the Holy Father, whereby he introduces himself and briefly explains his reasons for seeking the dispensation. He dates and signs his petition for dispensation.

The petition is transmitted to the CDF, together with the *votum* of the ordinary/hierarchy. The CDF forwards it to the Holy Father. If the Pope accepts the petition, the CDF will transmit the rescript of dispensation to the ordinary/hierarchy, who will give legitimate notification to the petitioner.

## 8.2 — Recourse of the Cleric against Singular Administrative Acts<sup>240</sup>

The accused cleric can lodge recourse against all singular administrative acts decreed or approved by the CDF. Such recourse must always involve an advocate who has a “specific mandate.”<sup>241</sup> The recourse must indicate clearly what is being sought (*petitum*), and the reasons in law (*in iure*) and in fact (*in facto*) on which the recourse is based.

## 8.3 — Guidelines of Episcopal Conferences<sup>242</sup>

On 3 May 2011, the CDF issued a circular letter to assist episcopal conferences in developing guidelines for dealing with cases of sexual abuse of minors perpetrated by clerics.<sup>243</sup> The *Vademecum* states that the text of any such guidelines “should also be taken into account.”

## 8.4 — The Death of the Accused

The *Vademecum* acknowledges that sometimes the cleric accused of sexual abuse of a minor is dead or dies. Three distinct scenarios are identified.

<sup>240</sup> *Vademecum*, art. 158 which refers to *2010 Normae*, art. 27.

<sup>241</sup> See *CIC*, c. 1485; *CCEO*, c. 1143.

<sup>242</sup> *Vademecum*, art. 159.

<sup>243</sup> CDF, Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuse of Minors Perpetrated by Clerics, 3 May 2011. See John Paul KIMES, “*Simul et cura et solertia*. Guidelines of the Episcopal Conferences for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics,” in Claudio PAPALE (ed.), *I delitti riservati alla Congregazione per la dottrina della fede. Norme, prassi, obiezioni*, Quaderni di Ius Missionale 5, Rome, Urbaniana University Press, 2017, 45-74; José-Félix VALDERRÁBANO, “Manuales y protocolos para la protección de menores y personas vulnerables contra el abuso sexual,” in *Commentarium pro religiosis et missionariis*, 101 (2020), 121-157.

(1) If the *notitia de delicto* concerns a deceased cleric, no penal process can begin.<sup>244</sup> (2) If the accused cleric dies during the preliminary investigation, a subsequent penal process cannot begin, but it is recommended that the ordinary/hierarchy still inform the CDF.<sup>245</sup> (3) If the accused cleric dies during the penal process (extrajudicial or judicial), the CDF must be informed of his death.<sup>246</sup>

### 8.5 — The Former Cleric in the Preliminary Investigation and the Penal Process<sup>247</sup>

The accused cleric has the right to seek a dispensation from all clerical obligations; moreover, it could happen that he is dismissed from the clerical state for some other delict. This dispensation/dismissal can occur during the preliminary investigation or during the penal process. If the accused cleric loses the clerical state during the *preliminary investigation*, the ordinary/hierarchy must evaluate whether to continue it “for the sake of pastoral charity and the demands of justice with regard to the alleged victims.” If he loses the clerical state during the *penal process*, the process can continue to its conclusion, “if for no other reason than to determine responsibility in the possible delict and to impose potential penalties. In fact, in the determination of a more serious delict (*delictum gravius*), what matters is that the accused was a cleric at the time of the alleged delict, not at the time of the proceeding.”

### 8.6 — Keeping the Alleged Victim and the Accused Cleric Informed<sup>248</sup>

The ordinary/hierarchy is to inform the alleged victim and the accused cleric, upon their request and in suitable ways, about the individual phases of the proceedings. The *Vademecum* adds that, in accord with the 6 December 2019 instruction on the confidentiality of legal proceedings,<sup>249</sup> the ordinary/hierarchy should take care “not to reveal information covered by the pontifical secret or the secret of office, the divulging of which could cause harm to third parties.”

<sup>244</sup> *Vademecum*, art. 160.

<sup>245</sup> *Vademecum*, art. 161.

<sup>246</sup> *Vademecum*, art. 162.

<sup>247</sup> *Vademecum*, art. 163.

<sup>248</sup> *Vademecum*, art. 164.

<sup>249</sup> 6 December 2019 *Rescriptum*.



## *Conclusion*

The *Vademecum* is a pastoral and practical instruction welcomed by everyone involved in the investigation and resolution of allegations of the *gravius delictum* of sexual abuse of a minor by a cleric. It invites ongoing profound reflection and diligent study. Its directives reflect existing law and *praxis*; they include elements which can be implemented in investigating and resolving other alleged delicts, including other reserved *graviora delicta*. Among the elements in the *Vademecum*, the following are especially noteworthy:

- The scope of the reserved *gravius delictum* as it has developed in jurisprudence and the *praxis* of the CDF;
- The emphasis on applying only the law operative at the time (the *ius vigans*) to any alleged delict;
- The strong insistence of the accused cleric's right to self-defence in any penal process;
- The right to privacy versus the legitimate disclosure of information;
- The acknowledgement of the various sources of the *notitia de delicto*;
- The importance of the confessor, who cannot break the inviolable sacramental seal, to encourage the penitent to report sexual abuse of minors by clerics;
- The various aspects of the reciprocal cooperation between ecclesiastical and civil authorities;
- The purpose, focus, and appropriate duration of the preliminary investigation; occasions when it is unnecessary; the contents of the *acta* of the preliminary investigation forwarded to the CDF;
- The requirement that the ordinary/hierarchy conduct a preliminary investigation even if the prescription period has passed, and to pass the *acta* onto the CDF;
- The purpose, nature, and application of precautionary measures ("administrative leave") and other disciplinary measures upon the accused;
- The three possible conclusions of a penal process: conviction (*constat*), acquittal (*constat de non*), and dismissal (*non constat*);
- The decision not to address directly the judicial penal process, norms concerning which in each Code are judged to be sufficient;
- The elaboration of the steps in the extrajudicial penal process, including elements from the judicial penal process which would be incorporated into the extrajudicial penal process;
- The distinct elements of the extrajudicial penal process in the *CIC* and the *CCEO*;
- The manner of investigating anonymous reports;

- The impossibility of treating as a delict the sexual abuse of a minor committed by a man prior to his becoming a cleric;
- The processing of cases against one who is no longer a cleric;
- The handling of allegations against dead clerics;
- The role of the accuser in the process;
- The informing of the accused and the victims about the various stages of proceedings.

The text is presented on the Vatican website in seven modern languages. These versions are helpful in allowing ready study and application of the *Vademecum*. Yet, an official Latin text would be most welcomed to address any ambiguities or imprecisions among the various modern language translations, and to ensure the accurate implementation of the directives of the instruction. It would also seem appropriate for the *Vademecum* to make *explicit* reference to the presumption of the innocence of the accused cleric until his guilt is proven with moral certitude.

The *Vademecum* is intended for immediate application. Although it establishes stable *praxis*, nonetheless the instruction acknowledges periodic updates as law or *praxis* changes. For this reason, this handbook is designated as “Version 1.0.” Such periodic updates may reflect changes in law, *praxis*, and jurisprudence. Indeed, it may be helpful to consider some modifications in terminology in future versions, most particularly employing “confidentiality” in lieu of “secrecy,” the latter of which can commonly connote a kind of “ecclesiastical cover-up.”

This most welcomed step-by-step manual is another indication of the intention of the Church to address the scandal of the sexual abuse of minors by clergy in a manner which intends to “the restoration of justice, the reform of the offender, and the reparation of scandal.”<sup>250</sup>

<sup>250</sup> *CIC*, cc. 1311 § 2; see cc. 1341; 1343; 1345; 695 § 2.

## Appendix

### TABULAR SUMMARY FOR CASES OF DELICTA RESERVATA

<b>DIOCESE/INSTITUTE OF INCARDINATION</b>	
<b>CHURCH <i>SUI IURIS</i></b> (if Eastern)	
<b>ORDINARY</b>	
<b>CDF PROT. N°</b> (if known)	
<b>CLERIC'S FULL SURNAME(S)</b>	
<b>CLERIC'S FULL FIRST NAME(S)</b>	
<b>OFFICIAL I.D.</b> (photocopy if available)	

SIGNIFICANT DATES OF THE CLERIC					
Date of Birth		Diaconal Ordination		Age	
Perpetual Vows		Priestly Ordination		Years in Ministry	
POSSIBLE PREVIOUS PLACES OF INCARDINATION					
MINISTRY OUTSIDE OF DIOCESE/INSTITUTE OF INCARDINATION					
CLERIC'S CURRENT ADDRESS					
ADVOCATE/PROCURATOR (signed copy of mandate)					
ADVOCATE/PROCURATOR'S ADDRESS					
MINISTRY					
Year(s)	Parish/ Organization	Place	Appointment/Responsibility		

ACCUSATION(S) OF <i>DELICTA RESERVATA</i> AGAINST THE CLERIC				
Date of alleged delict(s)	Name and surname of alleged victim	Date of Birth	Place, frequency, and details of alleged delict(s)	Identity of person bringing allegation(s) & date of denunciation to ecclesiastical authority
OTHER PROBLEMATIC BEHAVIOUR/OTHER ACCUSATIONS				
Year(s)	Description			
CIVIL PROCEEDINGS AGAINST THE CLERIC				
Year	Type	Outcome of civil proceedings/Sentence (photocopy if possible)		
MEASURES ADOPTED BY ECCLESIASTICAL AUTHORITY				
Year(s)	Description			
CLERIC'S REMUNERATION				



## THIRTY YEARS OF THE APOSTOLIC CONSTITUTION *EX CORDE ECCLESIAE*: A CANONICAL OVERVIEW AND FUTURE PROSPECTS

MICHELE RIONDINO

**SUMMARY** — This article analyses the canonical framework of the Apostolic Constitution *Ex corde Ecclesiae*. Context is provided through an exploration of the profound impact of the development of Catholic universities on culture and society. It shows that a unique character and role of the Catholic university has been developed, rooted primarily in the Church's faithfulness to the Gospel Commission, which has resulted in a unique and irreplaceable role. The mission of the Catholic university is to be a place where the knowledge created by human endeavour is humanised with revealed truth and thereby turned into wisdom—with the unique assistance of the Church as the *expert in humanity*. The article concludes by locating the mission of the university as equipping today's students to embark on the noble endeavour of becoming *artisans of hope* in the world.

**RÉSUMÉ** — Cet article analyse le cadre canonique de la Constitution Apostolique *Ex corde Ecclesiae*. Le contexte est fourni par une exploration de l'impact profond du développement des universités catholiques sur la culture et la société. Il montre qu'un caractère et un rôle uniques de l'université catholique ont été développés, enracinés principalement dans la fidélité de l'Église à la Commission de l'Évangile, ce qui a donné lieu à un rôle unique et irremplaçable. La mission de l'université catholique est d'être un lieu où la connaissance créée par l'effort humain est humanisée par la vérité révélée et ainsi transformée en sagesse - avec l'aide unique de l'Église en tant qu'*experte de l'humanité*. L'article conclut que la mission de l'université est d'équiper les étudiants d'aujourd'hui pour qu'ils s'engagent dans la noble entreprise de devenir des *artisans de l'espoir* dans le monde.

## *Introduction*

*What makes an institution Catholic?* With these words, Father Francis G. Morrissey, OMI, began a 1987 paper published in *The Jurist*.<sup>1</sup> He answered that the catholicity of an institution is demonstrated by the life of the people within it. I concur that we can apply this principle to educational institutions in the Church, but another method of measuring catholicity is a lived fidelity to the Magisterium and the Church's juridical system. For the purposes of better understanding this, this paper analyses the intersection between canon law and Catholic social teaching in the field of higher education.

The year 2020 marked the thirtieth anniversary of the promulgation of the apostolic constitution *Ex corde Ecclesiae* (hereinafter *ECE*).<sup>2</sup> This constitution is the *magna carta* of Catholic universities. It crystallises the nature of the Catholic university that is, as the title reveals, born out of the very heart of the Church.

*ECE* reflects the high value and exciting potential Pope John Paul II saw in the Catholic intellectual tradition and his desire for the Church to make substantial contributions through its universities to society and the many challenges it faces. It is also noteworthy to find in such a document reference to the life and apostolic activity of the Pontiff himself. In *ECE* 2, John Paul II recalled his own experience as a young priest and lecturer in Poland. *ECE* was developed out of his experience of university life and his personal development during his time in a Catholic university. In fact, we can see that Karol Wojtyła applied his soul, mind, and strength to this document, reflecting his great love and commitment to the university. The Roman Pontiff made it clear in *ECE* 3 that the document was the fruit of a lifelong project of collaboration with people worldwide, as well as the Congregation for Catholic Education.

## **1 — Historical Development of Catholic University Education**

*“Go therefore and make disciples of all the nations”* (Mt 28:19-20, RSV) is the Great Commission. It is through the Church's faithful obedience to this command that the Church has made its mark on the development of both education and culture. As James A. Coriden perspicaciously explained, the

<sup>1</sup> Francis G. MORRISSEY, “What makes an Institution Catholic,” in *J*, 47 (1987), 531.

<sup>2</sup> POPE JOHN PAUL II, apostolic constitution on Catholic universities *Ex corde Ecclesiae*, 15 August 1990, in AAS, 82 (1990), 1475-1509.

prophetic function of announcing the good news is deeply correlated with the teaching function of the Church and its mission through the centuries.<sup>3</sup> Indeed, the Church has never considered Catholic education as only a tool for evangelisation only, but also as a vehicle to affect every dimension of human life, with the aim of contributing to the flourishing of every human person.<sup>4</sup>

Let us now briefly consider the origins and development of the Catholic university. Although an in-depth discussion of this history is outside the scope of this article, it is worthwhile to note some important parts of the story. Though the precise origin of the Catholic university is not clearly discernible, the Alexandrian School (*Didaskaleion*), active in Europe from the Second Century AD, was a significant early influence. This school had two objects: critiquing the dominant philosophical cultures in the academy of its day and countering the pervasive challenge of Gnosticism.<sup>5</sup> In ancient Greece, the academies were founded by Aristotle, Plato, and other very well-known philosophers. Later, in ninth century Asia, the Academy of Science in Baghdad also had a significant impact.<sup>6</sup> However, while these academies were significant and innovative, they are distinguishable from the idea of the university. The university movement began in the medieval period with the establishment of the universities of Bologna, Paris, Oxford, Cambridge, Salamanca, and Padua.<sup>7</sup> These universities operated, under a clear Christian influence, as *studia generalia* emphasising the disciplines of theology, medicine, and law (*ius canonicum* and *ius commune*), alongside the *trivium* and *quadrivium* of the classical tradition that shaped liberal arts programmes. These pioneering universities were also testament to the temporal power of the Church, especially during the medieval period.<sup>8</sup>

<sup>3</sup> For further details, see James A. CORIDEN, "Introduction," in CLSA *Comm*2, 911.

<sup>4</sup> This idea was put forward by Pietro PAROLIN, "L'Église catholique et l'éducation," in *Educatio Catholica*, 1 (2015), 35-46 (particularly p. 36).

<sup>5</sup> For further details, see Manuel J. ARROBA CONDE and Michele RIONDINO, *Introduction to Canon Law*, Milan, Mondadori, 2019, 100-103.

<sup>6</sup> For more on this, see David PALFREYMAN and Paul TEMPLE, *Universities and Colleges: A Very Short Introduction*, New York, OUP, 2017, 125.

<sup>7</sup> For an overview of the chronological development of the university in the medieval era and the contributions of the religious and monastic orders in establishing them, see Constant VAN DE WIEL, *History of Canon Law*, Louvain, Peeters, 1990, 84-90, 92-93; see also John M. ZANE, *The Story of Law*, New York, Garden City Publishing Company, 1927, 199-223. Before the medieval era there were a number of academic centres that were not permanent institutions of learning and as such are not considered universities; for further details, see Charles O. HASKINS, *The Rise of Universities*, Ithaca and London, Cornell University Press, 1957, 1-3.

<sup>8</sup> See Manfred HEIM, *Introduzione alla storia della Chiesa* (translation by Cecilia ASSO), Turin, Einaudi, 2002, 77-81.



One of the most famous examples of this power was the inception of the *Studium Urbis*, established between Rome and Lyon by Pope Innocent IV with three major academic disciplines: canon law, civil law, and theology. A significant characteristic of that *studium* was that its community of scholars moved around Italy and different European regions with the pontifical court.<sup>9</sup> Eventually, the original academic centre became the real *Studium Urbis*, established by Innocent III in Rome in 1303 also to instruct lay people.<sup>10</sup>

During its formative period, the story of the Catholic intellectual tradition was shaped by the bond between the Catholic university and the Church, as well as the interface between the Catholic university, society, and culture.<sup>11</sup> Monasteries and convents, with their expertise in manuscripts, formed themselves into centres for the transmission of knowledge and became *cultural circles*. These groups were committed to the preservation and restoration of both the cultural heritage of Greek and Latin philosophers and orators and the Fathers of the Church. They contributed to the preservation of the Western tradition even after the fall of the Western Roman Empire.<sup>12</sup>

However, their work went beyond restoration and preservation. Great teachers in the monastic tradition (St. Benedict, St. Bernard, St. Anselm, and St. Dominic, to name but a few) provided a profound service in the advancement of culture. The Church was integral in the development of a solid humanistic culture, especially in Europe,<sup>13</sup> and the Church has always contributed unique insight to this humanistic endeavour as an *expert in humanity*. Through these activities, the early *cultural circles* developed into *workshops of civilization*.

The intellectual flowering of the medieval period was the subject of special mention by Pope Francis in a recent speech at the University of Bologna.<sup>14</sup> The

<sup>9</sup> See Antonino MANTINEO, *Le Università Cattoliche nel diritto della Chiesa e dello Stato*, Milan, Giuffrè, 1995, 3-4.

<sup>10</sup> See Mario CARAVALE, "Per la storia dell'Università di Roma: la Sapienza," in *Le Carte e la Storia*, 2 (2003), 7-16.

<sup>11</sup> See R. Jared STAUDT, *The University and the Church*, Providence RI, Cluny Media Edition, 2019, XIX-XXXV. See also Ramon LAMAS LOURIDO, "Universidades católicas y grados académicos," in *REDC*, 4 (1949), 173-222.

<sup>12</sup> See Jacques LE GOFF, *Gli intellettuali nel medioevo* (translation by Cesare Giardini), Milan, Mondadori, 2017, 65-73; see also Brian TIERNEY, "Natural Law and Natural Rights," in John WITTE, Jr. and Frank S. ALEXANDER (eds.), *Christianity and Law: An Introduction*, New York, CUP, 2008, 91-101.

<sup>13</sup> See Michele RIONDINO, "L'Università cattolica nell'ordinamento canonico e nel Magistero della Chiesa," in *Studium*, 112 (2016), 52-64.

<sup>14</sup> For the original text of the speech, delivered by Pope Francis in Bologna, see [http://w2.vatican.va/content/francesco/it/speeches/2017/october/documents/papa-francesco\\_20171001\\_visitapastorale-bologna-mondoaccademico.html](http://w2.vatican.va/content/francesco/it/speeches/2017/october/documents/papa-francesco_20171001_visitapastorale-bologna-mondoaccademico.html) (accessed 10/7/2021).

integration of the Church and the university from its earliest days is demonstrated at Bologna, where scholars came together to engage in the study of canon law and civil law.<sup>15</sup> Pope Francis meditated on the term *universitas*, which connotes both the idea of a community as well as the idea of the whole. The Catholic contribution of these university communities was a working together towards the realization of a better future, founded on a mature responsibility to advance the common good. Today, the university continues to be an extension of this great tradition and, in the Pontiff's words, a *construction site of hope*.

Returning to our historical discussion, the Church has persevered despite obstacles and adversity stemming from antagonism to the Church from the State. Hindrances to the establishment of universities, academies of higher education or specialised centres of study promoted by the Church have always been present.<sup>16</sup> However, the Church's faithfulness to its *munus docendi* has been embodied in the many religious orders and congregations that have prevailed across the centuries, founding and building schools and universities around the world. The Church has indeed acted according to the Gospel Commission to go to *people of all nations*, and as fruit of this perseverance, it has developed access to higher education, including for those belonging to lower socio-economic classes.

The Catholic university has become an institution that labours to bring together human knowledge and revealed truth, in such a way that helps the whole of human society to flourish. Chronologically, the longest continually-operating Catholic University is the Catholic University of Leuven, established in Belgium in 1425, notwithstanding the split along language lines in

<sup>15</sup> For the origins, early history and the development of the Schools of Law in Europe, see Antonio GARCÍA Y GARCÍA, "The Faculties of Laws," in Hilde DE RIDDER-SYMOENS (ed.), *A History of the University in Europe*, vol. I, Cambridge, CUP, 1992, 388-408. See also James A. BRUNDAGE, *The Medieval Origins of the Legal Profession. Canonist, Civilians, and Courts*, Chicago, University of Chicago Press, 2010, 78 ff.; Richard H. HELMHOLZ, *The Spirit of Classical Canon Law*, Athens & London, The University of Georgia Press, 1996, 2-17.

<sup>16</sup> For the contribution of the Church in the development of schools and universities during the medieval period, particularly in Europe, see Paolo GROSSI, *L'Europa del diritto*, Roma and Bari, Laterza, 2007, 37-47. See also, Olaf PEDERSEN, *The First Universities: Studium Generale and the Origins of University Education in Europe*, Cambridge, CUP, 1997, 92-153; Philippe DELHAYE, "L'organisation scolaire au XII<sup>e</sup> siècle," in *Traditio*, 5 (1947), 211-268. For the development of the canon law as an autonomous discipline, particularly during the medieval period, not only for the Catholic Church but also for the other Christian denominations, see Mark HILL, "Canon Law: The Discipline of Teaching and the Teaching of the Discipline," in Troy L. HARRIS (ed.), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz*, Berkeley, Robbins Collections Publications, 2015, 337-353.

1968 into Katholieke Universiteit Leuven (Dutch-speaking) and Université catholique de Louvain (French-speaking). Another example is the University of Santo Tomas, which was established according to the Dominican tradition, as a college to prepare for ordination in Manila (Philippines) in 1611 and later elevated in 1645 by Pope Innocent X to the status of a university.

## 2 — *The Code of Canon Law and Catholic Universities*

In the twentieth century, a landmark achievement was the Pio-Benedictine Code of 1917 (hereinafter *Codex*). The *Codex* highlighted the importance of education and the raising of the young in multiple canons relating to Catholic education. In 1965, the conciliar declaration *Gravissimum educationis*<sup>17</sup> (*GE*)<sup>18</sup> broadened the language regarding the right to education from merely “the baptised” to “all people.” *GE* also referred to the right of all the Christian faithful to receive a Gospel-informed education according to the principles of the Church. Speaking on the mission of the university, *GE* reinforced the nobility of the intent of those who choose to teach or be taught within Catholic universities as people aiming to design solutions to encourage the growth of the entire human community.<sup>19</sup> The Catholic university has developed to facilitate an encounter between faith and scientific knowledge, as mutually enriching endeavours that intertwine and lead to the height of human wisdom.

Even if the *Codex* provided some general rules for Catholic education, it did not dedicate a specific section to either Catholic universities or ecclesiastical universities. The only clear reference to the Catholic university was in canon 1376, which stated that the statutes (or constitutions) of any Catholic university or faculty of studies had to be approved by the Apostolic See.<sup>20</sup>

<sup>17</sup> For the official English translation of *Gravissimum educationis*, see POPE PAUL VI, Declaration on Christian Education *Gravissimum educationis*, 28 June 1965, in *The Documents of Vatican II*, Sydney, St Pauls Publications, 2009, 375-386.

<sup>18</sup> See the accurate analysis put forward by Dermot A. LANE, “Catholic Education in the Light of Vatican II. Anthropology and Catholic Education,” in Sean WHITTLE (ed.), *Vatican II and New Thinking about Catholic Education*, London and New York, Routledge, 2017, 123-135.

<sup>19</sup> For further details, see Michele RIONDINO, “Reflection on Fifty Years of Church Teaching on Universities (from *Gravissimum educationis* to *Ex corde Ecclesiae*),” in WHITTLE (ed.), *Vatican II and New Thinking about Catholic Education*, 207-214.

<sup>20</sup> See Edward N. PETERS, *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001, 463. For a brief overview of previous of canonical legislation, see Francisco Xav. WERNZ and Petri VIDAL, *Ius Canonicum*, Romae, Apud Aedes Universitatis Gregorianae, t. IV, vol. II, 1935, 95.

A clear indication of the increasing value the Church places on education is the special attention given to Catholic education in the Code of Canon Law, promulgated in 1983 (hereinafter *CIC*). In Book III, The Teaching Office of the Church, we find under the umbrella of Title III, Chapter II, both Catholic universities and other institutes of higher studies. The *CIC* also distinguishes ecclesiastical universities (cc. 815-821) from Catholic universities (cc. 807-814).<sup>21</sup> This was the main change set forth by the new legislation.<sup>22</sup>

This distinction regarding *Catholic* and *ecclesiastical* universities is based on their different fields of study and their objects.<sup>23</sup> Catholic universities explore and deepen the *profane sciences*, whereas ecclesiastical universities contribute to the deepening of the *sacred sciences*. *ECE* tells us that, even if they are separate, the two do not have to be completely distinct, and it is where they intertwine that we have the advancement of culture. Moreover, canon 811 § 1 provides that Catholic universities must establish at least a

<sup>21</sup> See Frederick R. McMANUS, "Ecclesiastical Universities and Faculties," in CLSA *Comm2*, 972-976. See also the detailed analysis put forward by James H. PROVOST, "A Canonical Commentary on *Ex corde Ecclesiae*," in John P. LANGAN (ed.), *Catholic Universities in Church and Society: A Dialogue on Ex corde Ecclesiae*, Washington, D.C., Georgetown University Press, 1993, 105-136. There remains a debate between canon lawyers as to the point at which a university becomes *de iure* Catholic or *de facto*; see John M. HUELS, *The Teaching Office of the Catholic Church*, Ottawa, Saint Paul University, 2017, 223. See also James J. CONN, *Catholic Universities in the United States and Ecclesiastical Authority*, Rome, Gregorian University Press, 1991, 249-251; Alice GALLIN, "On the Road toward a Definition of the Catholic University," in *J*, 48 (1988), 536-558.

Previously, the first document on ecclesiastical centres of studies was the 1931 apostolic constitution *Deus scientiarum Dominus*, promulgated by Pius XI, which was the first important step for an organic reform of all the ecclesiastical faculties. Several documents after the promulgation of this apostolic constitution have provided changes and updates for the ecclesiastical institutions and for the ecclesiastical program of studies. The last significant reform was adopted in 2017 with the apostolic constitution *Veritatis gaudium*, promulgated by Pope FRANCIS, 8 December 2017, in AAS, 110 (2018), 1-34. For an analysis, see John M. HUELS, "Veritatis gaudium and the Canon Law on Ecclesiastical Universities," in *StC*, 52 (2018), 471-490.

The apostolic constitution *Sapientia christiana*, promulgated by JOHN PAUL II (15 April 1979, in AAS, 71 [1979], 469-499), considered ecclesiastical universities often as academic institutions within the set of Catholic universities (following the idea in *Preface III* of *Sapientia christiana*). For an overview of the juridical reforms after *Sapientia christiana*, see Damian G. ASTIGUETA, *Sapientia christiana y la legislación posterior*, in *Seminarium*, 44 (2004), 403-457.

<sup>22</sup> For a brief overview on the previous legislation, see Vincenzo DEL GIUDICE, *Nozioni di diritto canonico*, Milan, Giuffrè, 1970, 138-140.

<sup>23</sup> On that point, see the deep reflection put forward by Francisco J. URRUTIA, "Ecclesiastical Universities and Faculties," in *StC*, 23 (1989), 459-469.

chair of theology.<sup>24</sup> Today, in many cases, ecclesiastical faculties are still an integral part of Catholic universities. *ECE* is a theological transposition of the juridical norms provided in *CIC*'s duties and rights relating to the teaching function of the Church in educational matters. Chapter II is entitled *Catholic Universities and Other Institutes of Higher Studies*, and its first provision, canon 807, affirms the right of the Church to establish all kinds of universities and academic centres, with the innate and proper right to govern and administer them.<sup>25</sup> Canon 807 also elucidates the aim of the university, which is to contribute to culture and promote the growth and development of each human person. This is echoed later in article 2 of *ECE*.<sup>26</sup>

One of the most important points in the new legislation is the relationship between every Catholic university and institute of higher studies and the competent ecclesiastical authority.<sup>27</sup> A clear example of this is canon 811 § 1, which is a clear reflection of the conciliar declaration of *GE* no. 10. This canon provides that the competent ecclesiastical authority must be vigilant that its Catholic university or college has established a faculty, an institute, or at least a chair of theology, with an express direction that theological lectures must be given, particularly to lay students.<sup>28</sup> The majority of people who attend a Catholic university can be lay people, and the institution must provide theological and ethical training for them, which flows from the mission and identity of the institution.<sup>29</sup> This training must be particularly designed and connected to their chosen field of study and part of the

<sup>24</sup> Canon 811 § 1. "The competent ecclesiastical authority is to ensure that in Catholic universities there is established a faculty or an institute or at least a chair of theology, in which lectures are given to lay students also."

<sup>25</sup> For an extensive analysis, see again HUELS, *The Teaching Office of the Catholic Church*, 218-231; see also Angelo G. URRU, "L'educazione cattolica," in GRUPPO ITALIANO DOCENTI DIRITTO CANONICO (eds.), Rome, Pontificia Università Lateranense, 2001, 627-630.

<sup>26</sup> See José A. SILVA, "Universidad católica," in Javier OTADUY and Antonio VIANA and Joaquín SEDANO (eds.), *Diccionario general de derecho canonico*, vol. VII, Navarra, Aranzadi, 2012, 765-768; MANTINEO, *Le università cattoliche nel diritto della Chiesa e dello Stato*, 23-30; Patrick VALDRINI, "Les universités catholiques: exercice d'un droit et contrôle de son exercice (canons 807-814)," in *StC*, 23 (1989), 445-458.

<sup>27</sup> Particularly the Conferences of Bishops need to take note and consider regions where there are no Catholic institutions of higher studies and work to establish them there. For further details see James J. CONN, "National Norms for Catholic Universities 20 Years since *Ex corde Ecclesiae*," in *Seminarium*, 50 (2010), 733-764. Still relevant are the ideas put forward by Thomas J. GREEN, "The Church's Teaching Mission: Some Aspects of the Normative Role of Episcopal Conferences," in *StC*, 27 (1993), 23-57.

<sup>28</sup> See Sharon A. EUART, *CLSA Comm2*, 966.

<sup>29</sup> See James L. HEFT, *The Future of Catholic Higher Education*, New York, OUP, 2021, 185-200; Michael J. BUCKLEY, *The Catholic University as Promise and Project*, Washington D.C., Georgetown University Press, 1998, 20-25.

compulsory/core curriculum. Consequently, the second paragraph of canon 811 provides: “in every Catholic University there are to be lecturers which principally treat of those theological questions connected with the studies of each faculty.” The purpose of this is to assist all students to integrate a theological critique and ethical understanding into their chosen field of study.

The relationship between the ecclesiastical authority and the Catholic university is laid out clearly in canon 813. This canon recalls *GE* 10 and article 6 of *ECE* and determines that the competent ecclesiastical authority is responsible for ensuring the pastoral care of Catholic institutions of learning, including students, staff and any others who work at the university. Additionally, canon 814 makes it explicit that this pastoral care applies equally to both Catholic universities and other Catholic institutes of higher education.

The underpinning of canon 814 is also worthy of attention. The Legislator uses the term “higher studies,” so that even in countries where the State does not designate some institutes “universities,” the canonical legislation still applies. Also, as can be seen from canon 808, the expression “Catholic university” maintains within itself a legal status clearly detailed and defined.<sup>30</sup> It stipulates: “Even if it is in fact Catholic, no university is to bear the title or name of Catholic University without the consent of competent ecclesiastical authority.” The reason for this clarification is found in the fact that a Catholic university must maintain a special bond with the Apostolic See and the episcopal conferences.<sup>31</sup> It is still an interesting and valid concern formulated by James A. Coriden, almost twenty years again, regarding the serious question about the large number of Catholic universities and colleges in the USA—but not only—that they are not canonically established by the competent ecclesiastical authority.<sup>32</sup>

The mission of the Catholic university is embodied in the scholarly community. Canon 810 of the *CIC* describes professors and lecturers as those with both knowledge —“scientific and pedagogical suitability”—and the enlightenment of faith—“the integrity of doctrine and probity of life.” These personal qualities must be aligned or risk the project of the university. However, these institutions are not to become separated from the science of the

<sup>30</sup> See Manuel J. ARROBA CONDE, “The nature of the General Norms and the Nature of a Catholic University,” in Michele RIONDINO and Anthony CASAMENTO (eds.), *Ex Corde Ecclesiae: A Reflection after Thirty Years*, Sydney, St Pauls Publications, 2022, forthcoming.

<sup>31</sup> See, once again, RIONDINO, “L’Università cattolica nell’ordinamento canonico,” 54-56; see also Joseph A. KOMONCHAK, “The Catholic University in the Church,” in LANGAN (ed.), *Catholic Universities in Church and Society*, 42-51.

<sup>32</sup> See James A. CORIDEN, *An Introduction to Canon Law*, London, Burns & Oates, 2004, 116.

secular academy. For instance, canon 820 includes directives that even professors and lecturers in ecclesiastical universities and faculties should partner with other institutions, including non-Catholic universities, to foster a spirit of cooperation and partnership.

### 3 — *The Apostolic Constitution Ex corde Ecclesiae and Catholic Higher Education*

The promulgation of *ECE* was a very important moment for the academy, culture, and society. It is the *magna carta* of Catholic universities and crystallizes the identity and mission of Catholic educational institutions. Pope John Paul II emphasized that the Catholic university is born from the heart of the Church and has been developed over the centuries by the Catholic intellectual tradition. Consequently, the *alma mater* of the Catholic university is the Church itself.

*ECE* is made up of two different parts, the first theological and the second juridical. Thus, it is both a document of the Magisterium and a text of laws that are part of the juridical system of the Catholic Church. It is particularly germane to legal matters related to the nature of a Catholic institution of higher studies and the erection of Catholic universities and their university communities.

#### 3.1 — Identity and Mission

*ECE* highlights the unique, irreplaceable contribution Catholic universities make to the societies in which they are located. Catholic universities protect and advance human dignity and higher culture (no. 12). The university is dedicated to research, teaching, and training of students and, through this, it is sharing broadly the *joy in truth* (no. 4). This task is embodied in the university professor and lecturers, whose role is striving to be a true master of wisdom, as well as one proven in the field of their particular science, and demonstrating to learners a continuous intellectual humility and a strong spirit of charity. The *Universitas magistrorum et scholarium* works together to become a *workshop of culture* in the truest sense—the cultivation of humankind towards dignified life, making the Catholic university a blessing to all humanity.<sup>33</sup>

<sup>33</sup> For a discussion of this point, see Michele RIONDINO, “The Magisterium of the Church on Higher Education and Its Reflection in the Code of Canon Law. An Overview,” in *Jus Online*, 3 (2019), 204-224.



One of the principal tasks of the Catholic university is to be a place of encounter and dialogue between the knowledge that can be reached by human endeavor and the revealed truth. In fact, the apostolic constitution exhorts the university to take a leading role at the forefront of investigating and engaging all modes of attaining knowledge, in a way that is able to guide and enlighten the whole world (no. 15). The Catholic approach is not to be a stand-alone and self-sufficient island but to be a city of light on the continent of human wisdom. This is the principal underpinning “universal humanism,” which distinguishes a Catholic university from a modern secular university (no. 4). Therefore, *ECE* emphasizes the urgency of this mission in our age, which is searching for certainty, wisdom, and a way to live a meaningful, worthwhile life. Scholars are encouraged to bring a Christian perspective to their own discipline and transform it with the light of truth, with cooperation across all academic disciplines (no. 35).

The Catholic university aims for the Christian mind to achieve a public, persistent, and universal presence in the enterprise of advancing higher culture (no. 9). *ECE* provides some examples and recommendations of this: research which focuses on human dignity, justice for all, family life, stewardship of nature, fairness in economics, the quest for peace and stability of human politics, and the fostering of the international community (no. 32).<sup>34</sup> These contributions need protecting, and the Catholic university plays a role in ensuring this prophetic voice is heard and contextualized, as it is one which takes great care to know cultures deeply, defending their identity, whilst bequeathing the benefit of truths for the whole human family. The Catholic university is enabled to “speak uncomfortable truths” to safeguard the authentic good of society, just as the *Logos* acted to safeguard humanity (no. 32). Alongside and interrelated with this prophetic function is what can be described as “institutional evangelism.” *ECE* highlights that evangelism occurs not only at the individual level but also at the level of institutions (*ECE*, nos. 48-49). The Church, by providing a witness to society of the Gospel concern for the dignity of all persons, can provide a compelling evangelical witness to the goodness of the Truth.

Additionally, the university is to have a close relationship with the society where it is located. This is linked to the practical ethical responsibility of Catholic universities to have a role in helping “promote the development of

<sup>34</sup> On this last point, it can be remembered that the broad edifice of the international law has its own foundation in the work and academic dedication particularly of the Dominican Francisco de Victoria, who is unanimously considered one of the founders of international law alongside Alberico Gentili and Hugo Grotius. For further details, see Ramon HERNÁNDEZ, “The Internationalization of Francisco De Victoria and Domingo De Soto,” in *Fordham International Law Journal*, 15 (1991), 1031-1059.



emerging nations” (no. 34). This is hardly surprising, given that Catholic education arises from missionaries forming institutions throughout the world. Today, there are almost one thousand four hundred Catholic universities and institutes of higher studies, spread throughout the five major continents. This is testament to the global commitment of the Church to providing education and formation in different fields.<sup>35</sup> This is a clear reflection of the deep commitment of the People of God and their cooperation in the *munus docendi* of the Church.

### 3.2 — General Norms

The second part of *ECE* relates to the nature and identity of the Catholic university, the university community, and fruitful cooperation between the university, the Church, and greater society. In all its activities, the Catholic university is distinguished by its unwavering Catholic identity (art. 2 § 1). *ECE* emphasises that all university functions are to be conducted with reference to the university’s mission. This responsibility to uphold and strengthen the Catholic identity of the university is shared, though to differing extents, by all members of the university.<sup>36</sup> However, *ECE* also highlights the principle of freedom in research and teaching (art. 2 § 5). This freedom of inquiry must be respected and supported in every discipline and fostered organically, within the generative guidelines of respect for truth and the common good.

Article four dedicates five paragraphs to the university community, in which it makes clear that the responsibility for maintaining and reinforcing Catholic identity and mission belongs to all members of the university community. Those recruited to become part of the university must be willing and able to promote, or “at least to respect,” its Catholic identity. Consequently, when they are appointed, all academics and administrators are to be informed about the Catholic identity of the institution (art. 4 § 2). “To promote” implies a commitment to advance and proclaim the Catholic identity of the university; “to respect” implies that, even when one is not Catholic, one must seek to understand the core of the university—without which respect is impossible (art. 4 § 4). Furthermore, the majority of those holding senior positions are to be Catholic; the number of non-Catholic academics and executives should not outnumber the Catholic ones. This is important in

<sup>35</sup> For an illuminating discussion on the university as a promise for our future, see Jaroslav PELIKAN, *The Idea of the University. A Re-examination*, New Haven and London, Yale University Press, 1992, 146-156.

<sup>36</sup> See John P. GALVIN, “Ex Corde Ecclesiae: Perspectives on the Document,” in *J*, 59 (1999), 111-118. Relevant still is the reflection by Pio LAGHI, “The Catholic University as University and as Catholic,” in *Seminarium*, 35 (1995), 369-376.

order to safeguard the Catholic identity of the university, even where this is quite difficult, particularly in some regions of the world where the majority of the society are neither Catholic nor Christian, in accordance with the Great Gospel Commission, this is a challenge for those institutions to provide and foster Catholics to fill these roles. *ECE* also refers to the formation of moral and ethical principles in the students (art. 4 § 5), by linking the social teaching of the Church with the professional training and formation of every student. All these things should create a university culture that will be more of a “family” model than the “hotel” model of the modern secular university.<sup>37</sup> In a family, there are differences but shared values; in a hotel people operate on completely different paths, and even their shared space is neutral.

The third important theme threaded throughout *ECE* is the cooperation between the Church, the Catholic university, and society. Through this cooperation, the Catholic university can contribute solutions to many problems facing modern society. This cooperation stresses the important distinctive of the networked nature of research throughout Catholic universities and institutions of higher learning throughout the world, including ecclesiastical faculties (art. 7). Catholic universities are also to cooperate with State universities, in a spirit of charity and collaboration, each bringing its own perspective.<sup>38</sup> Moreover, Catholic universities should cooperate with international organisations and government-run programs to promote justice, development, and progress (art. 7 § 2). All of this must be accomplished without abandoning the Catholic university’s commitment to human dignity, humanistic culture, human rights, and the striving for common good—grounded in Christian theology and ethics. This approach is enriched by dialogue with the profane sciences, including such as Law, Sociology, Natural and Health Sciences.

#### 4 — *ECE Discussion and Prospects*

In the decades since the promulgation of *ECE*, there has been much development of its key parts. For example, Pope Benedict XVI highlighted

<sup>37</sup> See Ian S. MARKHAM, “The Idea of a Christian University,” in Jeff ASTLEY, Leslie J. FRANCIS, John SULLIVAN, and Andrew WALKER (eds.), *The Idea of a Christian University*, London, Paternoster Press, 2004, 5 ff.

<sup>38</sup> For a regional perspective, see the interesting reflections put forward by Philip GLEASON, “The American Background of *Ex corde Ecclesiae*: A Historical Perspective,” in LANGAN (ed.), *Catholic Universities in Church and Society*, 13-15. See, once again, HEFT, *The Future of Catholic Higher Education*, 148-160.

the role of the Catholic university in enriching social and civil community.<sup>39</sup> Pope Francis has spoken of the term *universitas* being about communities dedicated to encounter and dialogue, built on a *culture of meeting*. This *culture* is both practical and profound, speaking not only to the interpersonal aspects of personal encounter but also to the dialogue between knowledge and the divine truth. Pope Francis has taught consistently that the Church's educational charism is manifested in its acting "in an interdisciplinary and integrated way."<sup>40</sup> Since his earliest speeches, he has taught that a *culture of proximity and encounter* will start a "courageous cultural revolution," beginning in the university. This manifests a paradigm shift towards a more harmonious society, as well as an academy where wisdom is found in Knowledge.<sup>41</sup>

Pope Francis teaches us to be cognisant of the relationship between the university and society, especially the world of labour. This concern is manifested in the way professors help students with the transition from the classroom to the world of labour. Bridging this relational gap between the university and labour is an active area of challenge.<sup>42</sup> In turn, students are to see their education as a way to prepare for contributing to society and the attaining the ideals of justice, responsibility, and solidarity.

This higher call of the university beyond mere technocratic endeavour was explained by Pope Francis in Bologna, where he described the university as a *construction site of hope, peace, and humanity*.<sup>43</sup> Any Catholic institution worthy of the name must not shy away from encountering the problems of the age within which it is placed. The Church's universities should be willing to critique significant issues, such as the calamity of war, dignity of labour, protection of human rights for the vulnerable, the care of refugees,

<sup>39</sup> For the original text of the speech delivered by BENEDICT XVI to The Catholic University of America in Washington DC, 17 April 2008, see: [http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080417\\_cath-univ-washington.html](http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf_ben-xvi_spe_20080417_cath-univ-washington.html) (accessed 22 July 2021).

<sup>40</sup> POPE FRANCIS, apostolic letter *Evangelii gaudium*, 24 November 2013, in AAS, 105 (2013), 1019-1137.

<sup>41</sup> The important phrase *courageous cultural revolution* is also found in no. 114 of the encyclical letter *Laudato si'*, 24 May 2015, in AAS, 107 (2015), 847-945; and later it is recalled by the Pontiff in no. 3 of the *Proemio* of *Veritatis gaudium*.

<sup>42</sup> POPE FRANCIS in Ecuador, during his visit to the Catholic University of Quito, 7 July 2015: [http://m.vatican.va/content/francesco/es/speeches/2015/july/documents/papa-francesco\\_20150707\\_ecuador-scuola-universita.html](http://m.vatican.va/content/francesco/es/speeches/2015/july/documents/papa-francesco_20150707_ecuador-scuola-universita.html) (accessed 22 July 2021).

<sup>43</sup> Speech delivered by POPE FRANCIS in Bologna on 1 October 2017: [http://w2.vatican.va/content/francesco/it/speeches/2017/october/documents/papa-francesco\\_20171001\\_visita-pas-torale-bologna-mondoaccademico.html](http://w2.vatican.va/content/francesco/it/speeches/2017/october/documents/papa-francesco_20171001_visita-pas-torale-bologna-mondoaccademico.html) (accessed 22 July 2021).

and pressing bioethical issues. In this way, the Catholic university is dedicated to humanising knowledge with revealed truth, making its members *artisans of hope* who put their expertise at the service of society.

The impact on the university of modern communication technologies is an unfolding drama. There are clear opportunities to further globalise the work of Catholic universities, as an international service to culture as *experts in humanity*. *ECE*, no. 45 directs universities to humanise the impact of technology and media on people, families, societal institutions, and the resulting culture. In this age of great advances in scientific knowledge and the ballooning of data available through modern computerised technology, the vital role of the Catholic university in humanising this with revealed truth is more important than ever.

The relational consequences of modern communication technologies must also be considered. Pope Francis has championed a renewed commitment to education as a natural antidote to some of the challenges of society, such as relativism, individualism, and indifference. Speaking about university teaching on online platforms during the COVID-19 pandemic, Pope Francis addressed the Diplomatic Corps and referred to the situation as “sort of education catastrophe,” intertwined with the crisis of fraternity in the modern world.<sup>44</sup>

## *Conclusion*

From this analysis, there are three main points with which we can conclude. Firstly, *ECE* is a theological document, but it has clear juridical content and implications. It completes the legislation related to Catholic institutions for higher studies and is binding on every Catholic university and Catholic centres for higher learning across the world. Following these rules is not optional. They must be respected at the establishment of universities and throughout the life of the institution particularly regarding the university’s recruitment, community, leadership, mission, and identity.

Secondly, if the Catholic university is an institution born in the heart of the Church, then it is a community without borders charged with promoting an intercultural approach. The people that choose to join a Catholic institution should be enriched by the institution, and it should also enrich their own culture. Reading *ECE*, it is clear that when establishing or promoting new

<sup>44</sup> For the official English translation of this address to the Diplomatic Corps accredited to the Holy See, see [https://www.vatican.va/content/francesco/en/speeches/2021/february/documents/papa-francesco\\_20210208\\_corpo-diplomatico.html](https://www.vatican.va/content/francesco/en/speeches/2021/february/documents/papa-francesco_20210208_corpo-diplomatico.html) (accessed 23 July 2021).

kinds of schools or departments, it must be done in a fashion which reflects the demands of the the locality—the region or country and the particular Church there—for the advancement of that society. Profound reflection should be conducted at the interface between the Catholic culture and the local culture to determine how it can serve and advance the common good. To achieve this, Catholic institutions of higher learning must be a public, persistent, and universal presence, and in the tradition of prophecy, speak words of life even if they are difficult to hear.

Finally, let us consider the twenty-first century challenges to the Catholic university. If the university experience is to be transformative, it is important that face-to-face instruction takes place (unless for some exceptional period, such as our current pandemic). It is natural that the Instruction of 13 May 2021 by Congregation of Catholic Education confirmed ecclesiastical universities and faculties cannot be moved entirely online.<sup>45</sup> Another challenge is to find a rapprochement between universities and the world of labour. There is also the challenge to institutions not to limit their programming to persons of privilege, thereby quashing the dreams of the young people who aim to embark on a university education.

I would like to conclude with some words from the poet T.S. Eliot. “There is work together. A Church for all. And a job for each. Every man to his work.” Every member of the Catholic university must work together to answer our world’s cry for truth and wisdom. The Catholic university plays a pivotal role in re-establishing the dialogue between human knowledge and revealed truth to benefit the whole of humanity. May this noble endeavour continue for generations to come.

<sup>45</sup> Instruction on the use of distance learning in Ecclesiastical universities and faculties, 13 May 2021. For the official English translation of the instruction, published by the CONGREGATION FOR CATHOLIC EDUCATION, see <http://www.educatio.va/content/dam/cec/Documenti/Insegnamento%20a%20distanza%20EN.pdf> (accessed 22 July 2021). Even if this instruction is not explicitly addressed to Catholic universities, we have to consider the implication from it for the Catholic University, which is that Catholic universities cannot act in spirit or fashion in opposition to what is provided to the Ecclesiastical universities, even if they are somewhat separately regulated.

## A TURNING POINT IN CLERGY/LAITY ROLES IN THE CHURCH?

LYNDA ROBITAILLE

**SUMMARY** — This essay starts with the observation that the non-ordained already exercise decision-making power in the Church, so continuing to debate whether they are capable of doing it is pointless. Instead, the focus should be on the manner of this decision-making and what it means for the community of the Church. Particular attention must be paid to an ethnographic understanding of this activity. The author argues that the proper questions to be addressed relate to the agents of this power and what this says about the direction in which the Holy Spirit may be leading the Church.

**RÉSUMÉ** — Cet essai part du constat que les non-ordonnés exercent déjà un pouvoir de décision dans l'Église, et qu'il est donc inutile de continuer à débattre de leur capacité à le faire. Il convient plutôt de se concentrer sur les modalités de cette prise de décision et sur ce qu'elle signifie pour la communauté de l'Église. Une attention particulière doit être accordée à une compréhension ethnographique de cette activité. L'auteur soutient que les questions qu'il convient de se poser concernent les agents de ce pouvoir et ce que cela indique quant à la direction dans laquelle l'Esprit Saint peut conduire l'Église.

### 1 — *Introduction*

*Undoubtedly, we will be called upon to renounce the traditional roles of both clergy and laity. This will not be easy, and calls for a mind-set that will let the seed 'grow.'*<sup>1</sup>

In 2015, Frank Morrissey noted that we needed to think through the “traditional” roles of clergy and laity, with a mind-set for growth around how laity can be more responsible in the life of the Church: “Shared responsibility implied empowering those who could be responsible, keeping in mind

<sup>1</sup> F. MORRISSEY, “The Role of Law and the Exercise of Authority within the Church, Particularly at the Parish Level,” in *The Canonist*, 6 (2015), 220-249, here at 239.

that priests cannot do everything; if they wish to survive, they must share responsibilities, be attentive to others (not just the regulars), value efforts of new workers, but without turning the laity into second-class clerics.”<sup>2</sup> Morrisey concluded: “I am particularly concerned with the fact that we are still promoting lay functions, but in a clerical model.”<sup>3</sup>

Two important issues arise from Morrisey’s comments: the implied premise that priests need to share responsibility because they are overworked, and “cannot do everything ... if they wish to survive,” and that laity fulfilling functions in the Church can easily turn them into “second-class clerics.” These statements presume that the role of priests is “in the Church” and the role of the laity is not. A lay person may share the priest’s burdens to help him out, but this is not the layperson’s ‘natural’ or normal place. The first presumption must fall: priests do not need to share responsibilities because they should not be held responsible for all functions but because these responsibilities belong to all the faithful. The structure that promotes primarily priests as office holders with decision-making power needs to change, and we must reflect as a community on what responsibilities there are and who might fulfill them.

Morrisey expressed a second common concern, namely that a lay person might become a “second-class cleric” by undertaking certain roles in the Church. Implicit in this is the sense that there are roles that are the purview of clerics and roles that are not. If a lay person fulfills such “unnatural” roles, that person becomes a “second class cleric”—not a cleric, but rather acting in a cleric’s rightful place. Yet, that makes no sense. Either a lay person is capable by baptism of fulfilling such a role or not. If the lay person is capable, then he/she fulfills the role as a lay person perfectly well, perfectly validly.

Throughout this discussion, we must keep in mind the “clericalisation” of the laity, which must be avoided. Clericalism presumes a relationship of superiority / inferiority, in which the ordained would be treated as (and might feel) superior to the non-ordained. When laity are clericalized, they feel that those serving as leaders in the Church are somehow superior to the rest of the faithful. There is no place in the Church for any such attitude on anyone’s part.

I have spent years arguing for the place of lay people in decision-making roles by reason of their baptism.<sup>4</sup> My own thinking first focused on lay

<sup>2</sup> Ibid., 239.

<sup>3</sup> Ibid., 241.

<sup>4</sup> See my “A Subtext in the Canonical Discussion of Clergy/Laity Issues: Gender,” in *StC*, 34 (2000), 467-488; “Ministry – Twenty Years after the Code,” in *Forum*, 16 (2005), 459-478; “A Canonical Wish-List for the Authorization of Lay Ecclesial Ministers,” in W. CAHOY (ed.), *In the Name of the Church. Vocation and Authorization of Lay Ecclesial Ministers*, Collegeville, Liturgical Press, 2012, 117-140.

people assuming offices in the Church, then considered improving participative and consultative structures to bring about good, shared decision-making.<sup>5</sup> While I still believe this to be important, I have come to conclude that one cannot build good consultative structures based on the hope that those invested with decision-making authority will consult meaningfully. Rather, we must focus on who takes responsibility and who makes decisions, to pave the way for that to happen. An important step is to recognize that not all offices and decision-making roles need to be filled by clerics. My thinking was shocked into focus in 2018 by Roberto Interlandi in his book (based on his doctoral dissertation) on power in the Church, which concluded: "... certainly it is important to avoid 'some alienating tendencies that could bring about ... a clericalization of the laity or a laicization of the clergy' (Pierantonio Bonnet, 'La ministerialità laicale,' 1987). For this reason, for reasons of convenience (expediency), perhaps it is preferable that ecclesiastical offices are in many cases given to clerics."<sup>6</sup> Interlandi implies that, because we are so accustomed to having clerics fulfill certain roles, we should stick to what we know! Is it truly preferable not to upset the *status quo* and stick with the convenient and expedient solution of giving offices to clerics because we are accustomed to it? Is it truly preferable not to face the reality that better work gets done when many participate and when each takes on the role that truly fulfills his/her gifts? Why not face the world from the understanding that no one category of person—cleric or lay—is the 'right' person to fulfill a role? Interlandi continues in hope:

But, in our opinion, it would be important not to confound these reasons of convenience (expediency) with dogmatic-theological reasons which would confirm the presumed ontological and canonical incapacity of lay people to the power of governance. Common and traditional doctrine is theologically certain, in fact, of the ontological and canonical capacity of the laity, or better, of non-clerics, to the power of governance. This is how they 'can cooperate' in the exercise of this power, as described in canon 129, §2, and

<sup>5</sup> See my "Decision-Making in the Church: Shared Governance," in D.L. ORSUTO and R.S. WHITE (eds.), *Full, Conscious and Active. Lay Participation in the Church's Dialogue with the World*, Vatican City, Libreria editrice Vaticana, 2020, 121-130.

<sup>6</sup> R. INTERLANDI, *Chierici e laici soggetti della potestà di governo nella Chiesa. Lettura del can. 129*, Rome, Gregorian and Biblical Press, 2018, 154-155 (= INTERLANDI, *Chierici e laici soggetti della potestà di governo nella Chiesa*). "Ora, come è stato fatto osservare, certamente sono da evitare 'talune tendenze ecclesialmente alienanti che potrebbero portare, nei modi e nelle forme più diverse, verso una clericalizzazione dei laici o una laicizzazione dei chierici' (P.A. BONNET, 'La ministerialità laicale,' in *Teologia e diritto canonico*, Studi Giuridici 12, Città del Vaticano, 1987, p. 128). Per questo motivo, per ragioni di convenienza, forse è da preferire che gli uffici ecclesiastici siano in molti casi affidati ai chierici."



confirmed by successive legislation, up to the present pontificate of Pope Francis.<sup>7</sup>

In the present-day Church, we accept as theologically, dogmatically, and canonically certain that the non-ordained are capable of exercising power of governance and roles in decision-making. We now have to build a Church wherein all can exercise their gifts and fulfill their appropriate roles. The fact that we might be accustomed to clergy fulfilling certain roles and that it might be uncomfortable to see non-clerics fulfilling roles that we associate traditionally with clerics does not mean that laity are being clericalized when they fulfill them. In Morrissey's words, we "need to renounce traditional roles of both clergy and laity."

### 1.1 — Inadequate Structures of Power in the Church

Before considering canonical structures, let us reflect on theological understandings of power in the Church. Richard Gaillardetz sets the scene for his discussion by defining power: "I consider 'power' as simply the capacity for effective action. Authentic ecclesial power, then, is the capacity to engage in effective action in service of the church's life and mission. 'Authority' qualifies a set of ecclesial relationships in which individuals or communities freely consent to participate in the exercise of power as both agents and recipients."<sup>8</sup> He notes: "church reform cannot settle with a simple redistribution of power (e.g., giving more power to pastoral councils); it must seek a fundamental transformation of the very way that power is conceived and exercised."<sup>9</sup>

What is a Church where priests do not need to be responsible for everything? Are there roles that belong only to the ordained and, if so, what are they? What roles can be taken up by lay people? How are lay people to take their rightful place in the life of the Church without being clerical? What does it mean to be clerical? Does asserting that one has a rightful place in the life and decision-making of the Church mean that one is clerical?

<sup>7</sup> Ibid., 154-155. "Ma a nostro giudizio sembra importante non confondere queste ragioni di convenienza con ragioni dogmatico-teologiche che avallerebbero la presunta incapacità ontologica e canonica dei laici alla potestà di governo. La dottrina comune e tradizionale, teologicamente certa, invece, è quella finora affermata della capacità ontologica e canonica anche dei laici, o, meglio, dei non-chierici, alla potestà di governo, i quali, pertanto, '*cooperari possunt*' all'esercizio di tale potestà, così come disposto dal can. 129 §2, e così come confermato dalla legislazione canonica successiva, fino al pontificato attuale di Papa Francesco."

<sup>8</sup> R.R. GAILLARDETZ, "Power and Authority in the Church: Emerging Issues," in R.R. GAILLARDETZ and E.P. HAHNENBERG (eds.), *A Church with Open Doors. Catholic Ecclesiology for the Third Millennium*, Collegeville, MN, Liturgical Press, 2015, 88 (= GAILLARDETZ, "Power and Authority in the Church: Emerging Issues").

<sup>9</sup> Ibid., 92.

In 2020, Sean Hall published a piece in the online edition of *La Croix* reflecting on the *Instruction on The Pastoral Conversion of the Parish Community*. “In current parlance it is ‘not fit for purpose.’ We desperately need a new paradigm and a different code of law based on that paradigm to help the church become, at all levels, what is clearly the call of the present situation to become ‘missionary disciples’ in the world today.”<sup>10</sup> Reflecting on and summarizing Thomas Kuhn’s 1962 “The Structure of Scientific Revolutions,” Hall concludes:

Whenever new observations are made that call into question a current paradigm, what happens, at first, is that the paradigm is bent every which way in order to accommodate those anomalies. This keeps happening until finally there is a revolution in thinking and the old paradigm is replaced by a new one that better explains the facts as currently known.... It is my contention that the current paradigm of the Code of Canon Law cannot be bent sufficiently to accommodate the reality of the situation in which we find ourselves today. It, not the reflections on becoming missionary disciples, needs to change the better to deal with this urgent calling.<sup>11</sup>

If all the faithful were to take up their roles as missionary disciples, building the community of the Church together, everyone’s role would be different. For some, whose roles are more intensively within the life of the Church, they would hold offices, exercise power, and make decisions. I agree that we are at time in the life of the Church where our present structures as outlined in the Code of Canon Law cannot accommodate the realities that we need to live. We are already bending our structures to try to fit theories of power expressed by canonical structures. These theories must be recognized as inadequate and needing revision.

## 1.2 — Examples Illuminate Possibilities

In 2015, Edward Hahnenberg spoke of the term “ministry” and quoted “the sociologist John Coleman ... [who] noted that it is precisely those things that are taken for granted that constitute a culture in possession.”<sup>12</sup>

<sup>10</sup> S. HALL, “The Mindset that Separates ‘the People’ from ‘the Clergy’,” in *La Croix International*, electronic edition, 10 August 2020, commenting on *Instruction* (July 2020) from the CONGREGATION FOR THE CLERGY, “The Pastoral Conversion of the Parish Community.”

<sup>11</sup> Ibid.

<sup>12</sup> E.P. HAHNENBERG, “Learning from Experience: Attention to Anomalies in a Theology of Ministry,” in R.R. GAILLARDETZ and E.P. HAHNENBERG (eds.), *A Church with Open Doors. Catholic Ecclesiology for the Third Millenium*, Collegeville, MN, Liturgical Press, 2015, 159 (= HAHNENBERG, “Learning from Experience: Attention to Anomalies in a Theology of Ministry”).

Hahnenberg continues: “The term *ministry* finessed the centuries-old distinction between clergy and laity and signaled a dramatic shift in emphasis—from ordination to baptism, office to charism, status to competency, and hierarchy to collegiality....”<sup>13</sup> He then spoke of theologies of ministry for the future, suggesting that we pay more attention “to the ministerial anomalies that shaped our past, mark our present, and point toward the future.”<sup>14</sup>

Highlighting ethnographic insights as a way of arriving at new understandings, Hahnenberg notes: “It sparks theological insight. It gives birth to new ideas or different ways of looking at old ideas.... What does not fit within our present theologies is what inspires future theological development.”<sup>15</sup> Hahnenberg focuses on anomalies. “To speak of an anomaly is to presume a common rule against which it stands as an exception. It is to posit a ‘normal,’ a mainstream, a dominant view or trajectory.”<sup>16</sup> He then considers the anomaly of laity fulfilling ecclesial offices by examining the “ministerial anomaly” of the parish life coordinator.

... a layperson, vowed religious or deacon who is entrusted with the overall pastoral care of a parish in the absence of a resident priest-pastor. Although canon law authorizes this ministry (c. 517.2) ... the role does not fit well into the prevailing theological consensus, which, following Vatican II’s patristic model of church, presumes a link between the ability to preside over the Eucharist and the ability to preside over the community. Parish life coordinators preside over the community; but, because they are not ordained priests, do not preside over the Eucharist. Thus they are something of an exception—a ‘stopgap measure’ which exists, according to the US bishops’ conference, “simply because of the shortage of priests.”<sup>17</sup>

Hahnenberg reflects on two extreme interpretations of the theological understanding that an ordained priest must preside both over the Eucharist and over the community—on one extreme is the opinion that there can be no parish leaders who are not priests, and on the other that anyone who presides over a community must be ordained. He comes to a middle ground:

But what if instead of rushing to resolve the anomaly, systematic theologians were to welcome the anomaly as a source for new theological insight? What if parish life coordinators were not regarded as a temporary solution but were received as an emerging form of leadership in the local church? Instead

<sup>13</sup> Ibid., 160.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid., 170.

<sup>16</sup> Ibid., 171.

<sup>17</sup> Ibid., 172-173, citing USCCB, *Co-Workers in the Vineyard of the Lord: A Resource for Guiding the Development of Lay Ecclesial Ministry*, Washington, DC, USCCB Publishing, 2005, 11.

of reinforcing the standard theological account, could the anomaly initiate a process of creative theological reflection, inviting the theologian to revisit the standard account—to reimagine the meaning of ecclesial community, the celebration of Eucharist, or the framework for ordered ministries? Might the anomaly lead to theological development? If so, then our theological reflection will need to attend closely to the lived experience of parish life coordinators.<sup>18</sup>

In this example, a parish is entrusted to a pastoral administrator according to canon 517 §2. There is a priest pastor who oversees everything and who exercises sacramental ministry. Who does the work? Who is the final decision-maker? Who is sharing whose responsibility? Not only do we need to pay attention to and learn from the lived experience of parish life coordinators, but we also must pay attention to all roles that are fulfilled by the non-ordained in the Church to learn what these anomalies mean.

Examples abound from present-day chanceries and parishes in which the non-ordained are taking on decision-making roles and exercising power of governance in the Church. These examples also demonstrate that, unlike the parish life coordinator—whose role is recognized by canonical structures—many roles in the Church are being exercised by the non-ordained but not recognized as such because a veneer of clerical responsibility seems to fulfill the letter of the law that an ordained cleric fulfills specific responsibilities. What does this tell us of the roles of the laity and clergy in today's Church?

A priest is a full-time pastor in a busy urban parish with a school. He also holds a couple of diocesan offices, as director of an important ministry in the diocese and episcopal vicar for another area. In effect, he fulfills two to three full-time offices in the diocese, two to three decision-making roles. He holds these offices because he is an ordained priest. He is intelligent, hard-working, caring, compassionate, but he is one person. Because of the traditional way of understanding who can exercise power and decision-making in the Church, he holds all these offices with final decision-making responsibility. He might choose to consult where he is recommended to consult, and he might listen. Nonetheless, he is overworked and liable to burn out, and others who could exercise their charisms in these roles are not given the opportunity. If they are given a role to play in his responsibilities, they are understood to be sharing in his role.

In another example, a priest is sent to study canon law and receives a degree. That he is ordained and educated renders him able (*habilis*) to be named judicial vicar, to exercise the role of single judge, and to be presiding

<sup>18</sup> Ibid., 173.

judge of a college of judges. He may or may not have had judicial experience. Nonetheless, the letter of the law would see it as preferable to name him judicial vicar and sole judge because he is a priest, not because of his experience or understanding of tribunal ministry. This priest might also be pastor of a busy parish, with an elementary school and many social outreach ministries. He might take responsibility for all decisions made in marriage nullity processes, or he might share that load with another office holder, like an adjutant judicial vicar (a cleric) or a director of the tribunal (a cleric or a lay person). The fact is that he is the final decision-maker, whether for the administration of the tribunal, the processing of tribunal cases, or as a judge in specific cases. This is certainly overworking a single person if he has the time and energy to accomplish all tasks of those roles himself. If others are helping or doing the work, and he is just signing off on it, what does that mean in reality?

Sometimes administrative duties are shared with another person. Someone might “ghost write” decisions for an ordained judge, who signs off on the decisions taken in the process, and/or the final sentence. Yet, he has not done the work; someone else has, and he takes responsibility for it. Again, he is considered to be sharing responsibilities proper to him as a cleric.

These examples illustrate a Church in which the ordained are recognized as being the only appropriate holders of certain offices and roles—whether they have the time and ability to do the work, and whether they have the appropriate skills and charisms. It is the fact of their ordination that is important, not a recognition of who is doing the work or who has the time to do it properly. Yet, because there is a shortage of priests, these priests are given too many responsibilities. So laypeople help them to fulfill their responsibilities. The question arises: who must fulfill these responsibilities? Do all the responsibilities belong only to the priest? What if the Church were a community of disciples whose skills were recognized and promoted for the well-being of the whole community?

Increasingly, we see that lay members of the faithful accomplish certain work and exercise specific roles, yet we do not always grant those people the appropriate titles or recognize the work that they are doing. Rather, we accept the fiction that the priest is performing work because he signed a document or claimed work as his own. In practice, the Church utilizes the skills of different people but does not recognize their accomplishments because of the traditional understanding of who exercises power. In addition to denigrating the work of the laity, there is a misguided sense that the fact that the ordained person who touches the work makes it “right.” In practice, in many chanceries and parishes throughout the world, lay people are doing

work that might be traditionally seen as the responsibility of the ordained. These “anomalies” should bring us to recognize that lay people can exercise these roles—even if we are not accustomed to it.

If too many lay people are recognized as accomplishing work that we are accustomed to seeing done by clergy, is that a clericalisation of the laity or the laity taking their rightful role in the Church? In 2019, Bishop Mark O’Connell noted:

I ask the question: which person would you rather have in charge of the non-sacramental pastoral and financial administration of your family’s parish: a priest who has no competence in pastoring, yet counts as a number, or a qualified deacon or lay person truly trained for the job? Put that way, I think it is a no-brainer; yet clergy personnel departments across the country are crossing their fingers and sending incompetent priests back into parishes.<sup>19</sup>

What structure of Church recognizes skill, charism, and talent rather than simply orders as the reason for a person holding decision-making power?

Much has been written about whether it is baptism or ordination that renders a person able to participate in the decision-making structures of the Church. Who has the power to make decisions and why? Is it baptism or ordination that enables one to take on certain roles?<sup>20</sup> As noted above, this article takes as a given that all the baptized are capable of exercising decision-making roles in the Church, provided they have the skills to undertake the role. Our point is to consider ways to make that happen. The ideal is that in the Church those best suited, best prepared, and best educated are given roles that require the exercise of the power of governance, that require decision-making for the good of the community.

<sup>19</sup> M. O’CONNELL, “Can We Open the Door Wider under the Current Law?” *CLSAP*, (2019), 5, accessed from the CLSA website, <https://clsa.org/wp-content/uploads/OConnell-major.pdf>, 24 February 2020 (= O’CONNELL, “Can We Open the Door Wider under the Current Law?”).

<sup>20</sup> For some examples, see W.C. AGUBUCHIE, *Lay Participation in Church Governance in Nigeria: Towards Pastoral Co-responsibility; With Emerging Values from Igbo (Nigerian) Cultural System of Governance*, unpublished dissertation, KU Leuven, Belgium, 2021; J. BEAL, “The Exercise of the Power of Governance by Lay People: State of the Question,” in *J*, 55 (1995), 1-92; G. GHIRLANDA, “De natura, origine et exercitio potestatis regiminis iuxta novum Codicem,” in *Periodica*, 74 (1985), 109-164; *idem*, “L’origine e l’esercizio della potestà di governo dei vescovi. Una questione di 2000 anni,” in *Periodica*, 106 (2017), 537-631; K. GILLESPIE, *Ecclesiastical Office and the Participation of the Lay Faithful in the Exercise of Sacred Power: Towards a Theological and Canonical Understanding of the Mutual Orientation in the Sign of Christ*, Rome, Editrice Pontificia Università Gregoriana, 2017; J. HUELS, “Towards Refining the Notion of ‘Office’ in Canon Law,” in *J*, 70 (2010), 396-433; *idem*, “The Power of Governance and Its Exercise by Lay Persons: A Juridical Approach,” in *StC*, 35 (2001), 59-96; R. INTERLANDI, *Chierici e laici soggetti della potestà di governo nella Chiesa*.

Is it good idea to name lay people to positions that seem to be outside the strict interpretation of the law? Gaillardetz helps us reflect on this question.

The authority of office ... generally presupposes that the office-holder is in some sense *an authority*, that is, a person who has specialized knowledge, wisdom, competence, or aptitude for a set of tasks. It is possible, of course, and in fact rather common, that one would assent to the exercise of authority by an officeholder who lacks the requisite knowledge, experience, competence or aptitude .... Over time, the exercise of authority by those who, in spite of their office, do not possess the requisite competence is bound to damage the life of the community.<sup>21</sup>

Would we not rather be a community whose decision-makers are competent, with skills suited to the office?

## 2 — *Laity as a Stop-Gap Measure?*

Given the reality of today's Church in North America and Europe, where there is a shortage of priests, and given the Code of Canon Law's and the Holy See's repeated preferences for ordained ministers being named to offices in the Church, Julie Trinidad writes: "many wonder if lay ecclesial ministers are merely stopgaps until the hoped-for time when there will once again be large numbers of priests."<sup>22</sup> Looking at the reality, we must come to an understanding that laity need to take on their rightful roles in the Church. Laity are not a stopgap measure. We are at a privileged time in the life of the Church when we recognize the importance of baptism and the competence of the lay faithful.

Morrissey alluded to the traditional canonical opinion that, because of ordination, priests are the appropriate holders of decision-making offices. Kevin Gillespie summarizes this understanding.

This participation in the priesthood of Christ, typical of each of the faithful in their proper manner either by baptism or sacerdotal orders, establishes a capacity that is typical and proper to each member of the faithful by participation in Christ's mission. The ordained, or at least those in sacerdotal orders, by virtue of the sacrament of order have the ability (*habilitas*) for those offices that are described as intrinsically hierarchical and offices carrying the full care of souls, for which reason they

<sup>21</sup> GAILLARDETZ, "Power and Authority in the Church: Emerging Issues," 108.

<sup>22</sup> J. TRINIDAD, "The Holy Spirit and Lay Ecclesial Ministry: Reflections for the 2020 Plenary Council," in *Australasian Catholic Record*, 96 (2019), 350.

are to be exercised only by a cleric. This ability (*habilitas*) also produces a presumption of suitability for offices and other ministerial assignments.<sup>23</sup>

Gillespie gives us a key to understanding the role of the laity in exercising offices in the Church: “the lay faithful have a capacity for all those offices that are not reserved by their very nature to the ordained (cf. can. 228). But the capacity does not establish a right either to office or to another public function in the Church.”<sup>24</sup> The lay faithful have the capacity. They do not have a right to specific offices, but neither does anyone else. A cleric might have the right to be considered before a lay person, because the bishop chose to ordain him presuming that he would be capable of fulfilling offices oriented to the full care of souls. But, equally important should also be talents, gifts, and charisms needed to fulfill each role, and it could well be that a lay person would be preferred over an ordained person.

Miriam Wijlens asks: “What does it mean theologically when a bishop delegates a layperson to act in the name of the church, for example, when she receives a *missio canonica* to preach and teach, is delegated to lead a parish (c. 517, §2), to grant dispensations (c. 135), or is appointed to act as judge (c. 1425)? Does the delegation by a bishop change the nature of the action performed by the lay person? What does it mean when such a delegation implies that the lay person acts in the name of the church?”<sup>25</sup> These questions need more study, but it is important that Wijlens recognizes that lay people can be named to these roles.

In 2011 or 2012, the Bishops of France published a document on the laity in the ecclesial mission of the Church in France: the fact of lay people in the ecclesial mission makes theological reflection progress. In fact, it is often the recognition of a lay person’s charism that leads to that person being called. In naming lay people to the ecclesial mission and in granting them letters of mission, the bishops are organizing the future of their dioceses; they are putting into practice their responsibility to discern the charisms (LG 12) to confide services and responsibilities indispensable to the

<sup>23</sup> K. GILLESPIE, *Ecclesiastical Office and the Participation of the Lay Faithful in the Exercise of Sacred Power. Towards a Theological and Canonical Understanding of the Mutual Orientation in the Sign of Christ*, Tesi Gregoriana Serie Diritto Canonico 107, Rome, P.U. Gregoriana, 2017, 412 (= GILLESPIE, *Ecclesiastical Office and the Participation of the Lay Faithful in the Exercise of Sacred Power*).

<sup>24</sup> Ibid., 413.

<sup>25</sup> M. WIJLENS, “Norms Alone Are Not Sufficient: A Canonical Reflection about Women in the Church,” in *The Canonist*, 7 (2016), 249, originally published in *L’Osservatore Romano Donne Chiesa Mondo*, 2 January 2017.



mission. They are not creating a fourth order next to those of bishops, priests and deacons.<sup>26</sup>

## 2.1 — Laity or Women?

A related question when considering laity and the exercise of power in the Church is the role of women. Women are not ordained, yet, a large number of the educated lay faithful who exercise roles of leadership in the Church are women. A recent article on the role of Catholic women in leadership notes: “As long as women are not able to be ordained and ‘as long as jurisdiction (the power to govern) is tied to ordination, a very limited number of roles with authority will be open to women. The relationship of jurisdiction to ordination creates a glass ceiling for women in the church.’”<sup>27</sup> Reid continues: “it is commonly agreed among Roman Catholic women that the solution does not lie in simply ordaining women. The whole clerical and hierarchical structure itself needs reforming, and sexist and patriarchal attitudes need to be transformed.”<sup>28</sup>

One cannot consider power in the Church without acknowledging the patriarchy and sexism that exists. However, we will focus on the equality of all the faithful in principle, as highlighted by canon law. Recently, Pope Francis emphasized that equality when changing canon 230<sup>29</sup> to permit

<sup>26</sup> BISHOPS OF FRANCE, “Les laïcs en mission ecclésiale en France: quelques repères pour aujourd’hui,” 2011 or 2012, part III, Questions ecclésiologiques ou pastorales: “L’arrivée des laïcs en mission ecclésiale fait progresser la réflexion théologique des fidèles sur ce qu’est l’Église. Elle fait prendre conscience de sa dimension **pneumatologique**. En effet, comme nous l’avons évoqué, c’est souvent la reconnaissance d’un charisme chez un laïc qui conduit à envisager de l’appeler. Les évêques, en nommant des laïcs en mission ecclésiale et en donnant des lettres de mission ne font pas qu’organiser l’avenir de leur diocèse, ils mettent en œuvre leur responsabilité de discerner les charismes (LG 12) pour confier à des fidèles laïcs services et responsabilités indispensables à la mission, ils ne créent pas pour autant un quatrième ordo à côté de celui des évêques, prêtres et diacres.”

<sup>27</sup> B.E. REID, “Twenty Years of Roman Catholic Women in Leadership: What Difference Did It Make?” in M.H. YOUNG (ed.), *ATS Women in Leadership: Celebrating Twenty Years*, The Association of Theological Schools in the United States and Canada, ATLA Open Press, Chicago, 2020, 104, where she is citing A. MUNLEY, IHM; R. SMITH, SC; H. MAHER GARVEY, BVM; L. MACGILLIVRAY, SNJM; and M. MILLIGAN, RSHM, *Introduction to Women and Jurisdiction: An Unfolding Reality. The LCWR Study of Selected Church Leadership Roles*, 2012.

<sup>28</sup> *Ibid.*, p. 104.

<sup>29</sup> FRANCIS, Letter to the Prefect of the Congregation for the Doctrine of the Faith regarding Access of Women to the Ministries of Lector and Acolyte, 10 January 2021, accessed at: [https://www.vatican.va/content/francesco/en/letters/2021/documents/papa-francesco\\_20210110\\_lettera-donne-lettorato-accollato.html](https://www.vatican.va/content/francesco/en/letters/2021/documents/papa-francesco_20210110_lettera-donne-lettorato-accollato.html)

both lay men and women to be admitted to the ministries of lector and acolyte, as well as to the newly instituted ministry of catechist.<sup>30</sup> How this is lived out in practice merits further study. Mary Ann Hinsdale has noted: “Focusing on the concrete reality of women’s lives would provide a primary locus for an ecclesiology ‘from below’ and qualitative research could provide ways to get beyond the ‘romantic abstraction’ of the anthropology of complementarity.”<sup>31</sup> For the purpose of this article, it is enough to emphasize that lay men and women can equally fulfill offices open to the laity in the Church.

## 2.2 — Full Care of Souls

“The fundamental distinction that has emerged regarding the canons in question is not a distinction between the power of governance founded on holy orders and a power of governance not founded on it; rather, the distinction is based on ‘offices’.”<sup>32</sup> Interlandi highlights those offices that require the full care of souls for which the exercise of sacerdotal ministry is necessary, and which could not be conferred validly on those who are not ordained priests (i.e., pastor (c. 521), parochial vicar (c. 546), chaplain (c. 564)). Thus, such offices cannot be given to a lay person or a deacon (cf. c. 150). All other offices can be given to a lay person and/or a deacon, as Gillespie explains.

Those offices for which sacerdotal orders are required are offices that require the celebration of the Most Holy Eucharist, the absolving of sins, the anointing of the sick and moribund, and, in the case of episcopal office, the confirmation of the baptized (although the law provides for delegation) and the ordination of sacred pastors. Thus, the full care of souls involves not merely authoritative teaching and governance, it also involves the power of sanctification through the sacraments.<sup>33</sup>

Only priests can fulfill offices with the full care of souls. For all other offices, we might be accustomed to seeing priests assigned to them, but we must question whether it is necessary.

<sup>30</sup> FRANCIS, Apostolic Letter m.p. *Antiquum ministerium*, 10 May 2021, Instituting the Ministry of Catechist, [https://www.vatican.va/content/francesco/en/motu\\_proprio/documents/papa-francesco-motu-proprio-20210510\\_antiquum-ministerium.html](https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20210510_antiquum-ministerium.html)

<sup>31</sup> M.A. HINSDALE, “A Feminist Reflection on Postconciliar Catholic Ecclesiology,” in R.R. GAILLARDETZ and E.P. HAHNENBERG (eds.), *A Church with Open Doors*, 132.

<sup>32</sup> INTERLANDI, *Chierici e laici soggetti della potestà di governo nella Chiesa*, 153.

<sup>33</sup> GILLESPIE, *Ecclesiastical Office and the Participation of the Lay Faithful in the Exercise of Sacred Power*, 418.

Another author raises the spectre of a Church where helping laity find their appropriate roles will demonstrate that they are more competent than priests.

There are several difficulties raised if we preference the laity over the deacons in the absence of a priest as presider or pastoral leader. The first of these is that we run into a logical problem. If we can preference the laity over one ordained minister, then why not the others? Why not appoint a lay person as presider over the Sunday assembly or as pastoral leader, even when we have sufficient priests? Why not appoint a lay person as pastoral leader of a diocese instead of a bishop?<sup>34</sup>

We must be clear: we are not trying to demonstrate that laity should “rule” the Church or should always be preferred for all roles, to the detriment of the clergy. Rather, recognizing an innate capacity in all the baptized to fulfill decision-making offices means moving to a Church structure wherein the most capable person is named to an office. It may be that there will be times when a lay person is better qualified than a priest. However, we are also clear that we are not advocating to change offices wherein priestly ordination is required for the full care of souls. The fact is that not all offices require the full care of souls.

### 2.3 — Permanent Deacons

When there is a shortage of priests to fill an office, some authors prefer the naming of a permanent deacon over a lay person. Here, the preference is for someone who has been ordained over someone who has not. James Coriden cites numerous Roman documents that prefer the naming of deacons over laity.

In addition, some documents from the Roman Curia have explicitly stated a preference for permanent deacons for such positions (footnote 26) mentions in passing that the canon gives preference to deacons. ... These statements of preference for deacons by the clerical congregations of the Roman Curia may derive from their own ideological presuppositions, but they also find grounding in the ‘Decree on Missionary Activity,’ *Ad gentes*, of the Second Vatican Council (n. 16).<sup>35</sup>

<sup>34</sup> A. GOOLEY, “Preference for the Ordained in Pastoral and Liturgical Leadership,” in *The Canonist*, 8 (2017), 121-122.

<sup>35</sup> J.A. CORIDEN, “Parish Pastoral Leaders: Canonical Structures and Practical Questions,” in *J*, 67 (2007), 476, citing the 1997 instruction from the CONGREGATION FOR THE CLERGY et al. on certain questions regarding the cooperation of the lay faithful with the ministry of priests *Ecclesiae de mysterio*, 15 August 1997, in AAS, 89 (1997), 852-877, at 866 (= CORIDEN, “Parish Pastoral Leaders: Canonical Structures and Practical Questions”).

Yet, Coriden also concludes: “There is a sense in which a preference for deacons in situations where there is a shortage of priests is deleterious to the identity and role of deacons themselves. The diaconate is an ancient and distinctive order with unique prerogatives and functions. It is harmful to envision and utilize deacons as ‘the next best thing’ to having a priest, or ‘supplying for priests’ when there aren’t enough of them around.”<sup>36</sup> In other words, the solution of choosing a permanent deacon is not necessarily appropriate.

Gillespie states that, in his opinion, the law is unclear.

This raises a query about how deacons (who are clerics) are related to intrinsically hierarchical offices, since there is no function that a deacon performs that cannot be performed by the lay faithful.... We can note that the revised Code of Canon Law establishes deacons as ordinary ministers with greater generosity than in the previous canonical dispensation (cf. cann. 861, §1; 910, §1; 911, §2; 943; 1108, §1; 1168). Certainly it can be said that deacons, being clerics, are given an ability (*habilitas*) for ecclesiastical offices that is at least *de iure*, including ecclesiastical offices that involve power of jurisdiction in particular (cf. can. 129, §1).<sup>37</sup>

While it may be true that, legally speaking, deacons are more able to be appointed to offices because of their ordination, the very fact that “there is no function that a deacon performs that cannot be performed by the lay faithful” highlights a prejudice in the law to avoid a lay person exercising the power of governance. We return to Roberto Interlandi’s comment: “for reasons of convenience (expediency), perhaps it is preferable that ecclesiastical offices are in many cases given to clerics.”<sup>38</sup> We must move beyond what is comfortable to what is just.

### 3 — *Clericalization of the Laity*

In 2018, the International Theological Commission noted:

Every renewal of the Church is essentially grounded in an increase of fidelity to her own calling. So, in carrying out her mission, the Church is called to constant conversion, which is a ‘pastoral and missionary conversion’, too; this involves renewing mentalities, attitudes, practices and structures, in order to be ever more faithful to her vocation. An ecclesial mentality shaped

<sup>36</sup> Ibid., 478.

<sup>37</sup> GILLESPIE, *Ecclesiastical Office and the Participation of the Lay Faithful in the Exercise of Sacred Power*, 417.

<sup>38</sup> INTERLANDI, *Chierici e laici soggetti della potestà di governo nella Chiesa*, 155.

by synodal thinking joyfully welcomes and promotes the grace in virtue of which all the baptised are qualified and called to be missionary disciples. The great challenge for pastoral conversion that follows from this for the life of the Church is to intensify the mutual collaboration of all in evangelising witness based on everyone's gifts and roles, without clericalising lay people and without turning the clergy into lay people, and in any case avoiding the temptation of 'an excessive clericalism which keeps them [lay people] away from decision-making.'<sup>39</sup>

The Canadian Conference of Catholic Bishops has cited Pope Francis, explaining that clericalisation of the laity occurs "by charging them with tasks and characteristics proper to the clergy (something more common in our day)."<sup>40</sup> We must be precise when considering "tasks proper to the clergy." Just because we might have been accustomed to seeing clergy fulfill certain tasks does not mean that those tasks are proper to the clergy. We have only to think of our recent past, when the Catholic school principal, Catholic high school teacher, and the Director of Mission in a Catholic hospital would have all been priests. The fact that those roles were filled by priests did not make them roles reserved to the clergy. Lay people who fulfill these roles are not clericalized, because these roles are no longer seen as exclusively clerical. We need to examine the tasks fulfilled by priests now and ask whether they are priestly tasks, or whether they are tasks that can be completed by any competent member of the faithful. The lens with which to discern is whether the role requires "full care of souls." If so, it is a priestly role; if not, it is not.

We see an increasing number of examples of the non-ordained being named to positions previously held by priests. For example, Sister Nathalie Becquart, XMCJ, was appointed a consultor to the General Secretariat of the Synod of Bishops in 2019 and named an undersecretary in 2021. Gerald O'Connell notes: "Pope Francis' nomination of Sister Nathalie to this position is another affirmation of his determination to appoint women to senior positions in the Vatican that do not require priestly ordination."<sup>41</sup> More

<sup>39</sup> INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church," 2 March 2018, #104, accessed on March 9, 2020: [http://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_cti\\_20180302\\_synodalita\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20180302_synodalita_en.html) (= INTERNATIONAL THEOLOGICAL COMMISSION, "Synodality in the Life and Mission of the Church").

<sup>40</sup> EPISCOPAL COMMISSION FOR DOCTRINE OF THE CCCB, *The Co-Responsibility of the Lay Faithful in the Church and the World*, 2016, II, #7, [http://www.cccb.ca/site/images/stories/pdf/CCCB\\_Co-responsibility\\_EN-web.pdf](http://www.cccb.ca/site/images/stories/pdf/CCCB_Co-responsibility_EN-web.pdf)

<sup>41</sup> G. O'CONNELL, "For the first time, Pope Francis appoints a woman with the right to vote as undersecretary of the synod of bishops," in *America*, 6 February 2021, <https://www.americamagazine.org/faith/2021/02/06/pope-francis-women-synod-voting-nathalie-becquart-239941>, accessed on March 21, 2021.

importantly, we see lay people being named to roles that would have been unheard of in a world in which a lay person might be in a position of “superiority” over a cleric. Bishop Mark O’Connell alludes to this:

... the utilization of lay judges of c. 1421 and lay finance officers of c. 494 seems to be no secret and widely used in dioceses. Here lay people are functioning well in roles traditionally occupied by a priest. Other functions in the Church are still mandated to be fulfilled by clerics, but permission can be sought for a qualified lay person to serve instead. I believe it is worth asking, for example, for the use of a lay person as promoters of justice in criminal trials, which indult is granted regularly by the Congregation for the Doctrine of the Faith. Moreover, the use of lay experts assisting in investigations—even for bishops—is allowed in *Vos estis lux mundi*, Article 13. I would submit that beyond the obvious “review boards,” anything a bishop can do to add qualified lay people to the criminal process is worth doing for the sake of credibility of the criminal process, when it lacks representation among the People of God.<sup>42</sup>

It is time to recognize that the person most qualified to be named to an office is not necessarily a priest. Rather, we should name the best qualified person. To do so will necessitate a re-evaluation of finances in a diocese, as it costs more to pay a lay person than a cleric or religious. However, this fact should not be a primary reason not to name a lay person to a specific office.

#### 4 — *The Synodal Path*

In 2018, the International Theological Commission clarified: “A synodal Church is a Church of participation and co-responsibility. In exercising synodality she is called to give expression to the participation of all, according to each one’s calling.... Participation is based on the fact that all the faithful are qualified and called to serve each other through the gifts they have all received from the Holy Spirit.”<sup>43</sup> In the Fall of 2021, the Church will embark on a multi-year synodal path, reflecting on “communion, participation, and mission.”<sup>44</sup> Gianfranco Ghirlanda, speaking of making decisions in a synodal fashion, notes that it is not the majority of votes that is the issue. It is not one side imposing its will on the other. Rather, it is to seek out the truth and

<sup>42</sup> O’CONNELL, “Can We Open the Door Wider Under the Current Law?” 6.

<sup>43</sup> INTERNATIONAL THEOLOGICAL COMMISSION, “Synodality in the Life and Mission of the Church,” nos. 67-68.

<sup>44</sup> SYNOD OF BISHOPS, “For a Synodal Church: Communion, Participation, and Mission. XVI Ordinary General Assembly of the Synod of Bishops,” 24 April 2021.

the good of the Church and arrive at a *consensus*, not by counting votes but by a convergence—by the action of the Spirit—toward a unity of opinions and intentions, which is expressed in a convergence toward unanimity: the counting of votes is only a way to verify this convergence. Thus, for Ghirlanda, it is not important whether there are consultative or deliberative votes, what is important is arriving at *consensus*.<sup>45</sup>

However, another way of looking at this comes from Alphonse Borras: “it might be best to say that the consultative organs [in the Church] elaborate (*elaboranno*) the decisions, and the final responsibility goes to the pastoral authority who assumes [*assume* in Italian] them.”<sup>46</sup> Coccopalmerio makes a distinction between a civil ‘deliberative’ vote and an ecclesial one. It is not sufficient in the ecclesial context for there to be a majority of votes, but it is essential that the pastor’s vote joins the majority. Coccopalmerio equates this to the decisions made in an ecumenical council—only definitive once the Pope’s agreeing vote is cast. The problem is: what to do when the pastor has a different opinion than the majority?<sup>47</sup> Coccopalmerio responds: if the pastor brings his opinion before God and still feels it is correct—even though against the consultation he did—that is okay, because all decisions must be taken as just before God.<sup>48</sup> In my opinion, Ghirlanda’s vision of coming to *consensus* is more illustrative of a Church which recognizes that all the baptized have a role. If a group of people have been given a task to discern and they cannot come to *consensus*, it would be inappropriate for a priest or bishop to take a final minority decision.

The process leading to the 2023 Synod will give all members of the faithful the opportunity to voice their opinions and concerns and to participate as

<sup>45</sup> G. GHIRLANDA, “Il ministero pastorale del vescovo nella diocesi: profili canonici,” in *QDE*, 32 (2019), 121; see also his “Presentazione,” in M. RIVELLA (ed.), *Partecipazione e corresponsabilità nella Chiesa. I Consigli diocesani e parrocchiali*, Milan, Ancora, 2000, 8. “Such *consensus* does not come from counting the votes, but rather it is found in the faith of the Church through the action of the Holy Spirit. The counting of voting demonstrates only if such *consensus* does or does not exist. This *consensus* tends toward unanimity because this is where the Spirit pushes it. Thus, considering things in this way, in itself it is not important that an organism, which in a communal spirit must be of help to authority in the fulfillment of its office for the good of the people of God, has deliberative or consultative vote, because the organism should always have before its eyes the service of the truth and of the Church.”

<sup>46</sup> A. BORRAS, “Sinodalità ecclesiale, processi partecipativi e modalità decisionali. Il punto di vista di un canonista,” in A. SPADARO and C.M. GALLI (eds.), *La riforma e le riforme nella Chiesa*, Biblioteca di teologia contemporanea 177, Brescia, Queriniana, 2016, 231-232.

<sup>47</sup> F. COCCOPALMERIO, “Il consiglio pastorale parrocchiale, ‘soggetto comunione deliberante’: attuazione efficace di sinodalità nella parrocchia,” in *EIC*, 59 (2019), 689.

<sup>48</sup> *Ibid.*, 676-677.

fully as possible. We hope to see great strides in the coming years as to the role of the laity in the decision-making processes of the Church.

### *Conclusion Toward the Future*

In 2007, James Coriden wrote:

One prominent canonist, writing on the ministry of the laity, refers to the situation of the lack of priests that justifies the “participation in the exercise of the pastoral care of a parish” being given to a person who is not a priest (c. 517 §2) as “a pastorally pathological situation” (footnote 6). It is not the insertion of lay persons into a pastoral office that is pathological; he insists that is their right. But he perceives that lay assumption of pastoral *leadership*, normally the prerogative of the ordained priest, is destructive of the unity of the pastoral office. It causes the sanctifying function (liturgical presiding) to be at least partially separated from the teaching and governing functions (footnote 7). Furthermore, this lay leadership calls up the specter of separation of the power of orders from the power of jurisdiction, an unfortunate dichotomy that the Vatican Council sought to transcend by stressing the unity of the pastoral office. A key question must be asked: is the present situation correctly described as pathological or rather should it be seen as a transitional phase toward a restructuring of Catholic ministry?<sup>49</sup>

We are now in a transitional phase towards the restructuring of Catholic ministry. Let us be open to the Spirit, to seeing the reality of the competent lay men and women, religious sisters and brothers, permanent deacons, priests and bishops who exercise ministry for the good of the Church community.

<sup>49</sup> CORIDEN, “Parish Pastoral Leaders: Canonical Structures and Practical Questions,” 464, citing first footnote 6: P. VALDRINI, “Ecclesialità e ministerialità della missione del fedele laico,” *Periodica*, 87 (1998), 545 and then footnote 7: A noted theologian makes the same point: B. SESBOÛÉ, “Lay Ecclesial Ministers: A Theological Look into the Future,” *The Way* 42.3 (July 2003), 59-61.



## THE RELATIONSHIP BETWEEN THEOLOGY AND CANON LAW UNDER THE PONTIFICATE OF FRANCIS

RIK TORFS

**SUMMARY** — The German canonist Hans Barion (1899-1973) distinguished three aspects in the relationship between theology and canon law, that of law as *ancilla*, as *custos*, and as *illuminatrix* of theology. This contribution applies these analytical keys to three areas dear to Pope Francis, namely, marriage procedures, the missionary parish, and sexual relations outside of canonical marriage. This leads to two conclusions, one on Barion's theory, the other on the policies of Pope Francis. The analytical instrument developed by Hans Barion is shown to be very useful while requiring more nuance; and as the pontificate of Pope Francis progresses, he faces increasing difficulties in concretizing his theological ideas at the level of the normative system of canon law.

**RÉSUMÉ** — Le canoniste allemand Hans Barion (1899-1973) distinguait trois aspects dans la relation entre la théologie et le droit canonique, celui du droit comme *ancilla*, comme *custos* et comme *illuminatrix* de la théologie. Cette contribution applique ses clés d'analyse à trois domaines chers au pape François, à savoir la procédure matrimoniale, la paroisse missionnaire et les relations sexuelles en dehors du mariage canonique. Ceci conduit à deux conclusions, l'une sur la théorie de Barion, l'autre sur la politique du pape François. L'instrument d'analyse développé par Hans Barion se révèle très utile tout en demandant davantage de nuance. Et le pape François éprouve, au fur et à mesure de son pontificat, des difficultés croissantes à concrétiser ses idées théologiques au niveau du système normatif du droit canon.

### *Introduction*

I met Professor Frank Morrissey for the first time in October 1980, in Fribourg, Switzerland at a conference organized by the *Consociatio Internationalis Studio Iuris Canonici Promovendo*. It was my first international conference, and I was impressed by the way Professor Morrissey showed an interest in the work

of young scholars. Later, we remained in touch, including in Leuven, where he was titular of the Monsignor Willy Onclin Chair. Frank Morrissey was a brilliant canon lawyer, able to find solid, pragmatic solutions, yet always in line with underlying theological ideas. As a North American, he preferred concrete solutions over endless theological perspectives that may be pleasing to the mind but ultimately lead to nowhere. At the same time, he always detected and recognized possible tensions between canon law and theology.

When it comes to theoretical constructions, German canon lawyers tend to be at the forefront. They are not afraid of seeking all possible connections between canon law—which is mostly perceived as a fully theological science—and its underlying sources. In this contribution, my point of departure stems from some ideas set forward by Hans Barion (1899-1973), a canon lawyer with highly debatable political opinions and conservative, if not reactionary, ecclesial views often expressed in a cynical and polemical way. He was also the author of thoughtful ideas and theoretical constructions with regard to the relationship between canon law and theology. I will use the theoretical framework established by Barion as a starting point to investigate several fields of current tension between theology, including theological ideas of Pope Francis as well as of Pope John Paul II, and their successful or failed canonical translation. To what extent can new ideas be implemented in an existing canonical framework that is already built on theological concepts, which are earlier and more traditional? Is such a limpid translation even possible? Or does one also have to include elements other than just the relationship between theology and canon law, leading to a more complex model of interaction between both? I think the latter is inevitable, as I will argue by examining whether and how far the theological ideas of Pope Francis have been translated into legislative texts.

## 1 — *Hans Barion on Canon Law and Theology*

Hans Barion, ordained a priest in the Cologne cathedral in 1924, wrote about the presuppositions of canon law, using the notion *antekanonistisch*. For him, these presuppositions existed without requiring further proof. They are given in an axiomatic way. At the same time, these presuppositions are important touchstones for a true understanding of the relationship between theology and canon law.<sup>1</sup> Barion distinguishes three different but

<sup>1</sup> Thomas NEUMANN, “Vom Inneren zu äußerem Dialog. Hinweise zu einer Topographie interdisziplinärer Kanonistik,” in Thomas SCHÜLLER and Thomas NEUMANN (eds.), *Kirchenrecht im Dialog. Tagungsband zur Tagung des Instituts für Kanonisches Rechts, 18-20 Februar 2019, Fulda*, Berlin, Berliner Wissenschaftsverlag, 2020, 14-17 (= NEUMANN, “Vom Inneren zu äußerem Dialog”).

compatible functions that the canonical system has towards underlying theology.<sup>2</sup>

The first function is that of canon law as an *ancilla theologiae*. Obviously, this humble role as a servant requires a canon law that is theologically obedient and technically well elaborated. Implicitly or explicitly, the vision of canon law as an *ancilla* is shared by many, including Pope John Paul II. In the apostolic constitution *Sacrae disciplinae leges* of 25 January 1983, he wrote that the purpose of the Code is to translate conciliar ecclesiology into canonical language.

The instrument, which the Code is, fully corresponds to the nature of the Church, especially as it is proposed by the teaching of the Second Vatican Council in general, and in a particular way by its ecclesiological content. Indeed, in a certain sense, this new Code could be understood as a great effort to translate this same doctrine, that is, the conciliar ecclesiology, into canonical language. If, however, it is impossible to translate perfectly into canonical language the conciliar image of the Church, nevertheless, in this image there should always be found as far as possible its essential point of reference.<sup>3</sup>

This vision leads us to three remarks. Firstly, John Paul II fosters the translation of the conciliar ecclesiology into canon law, yet at the same time he is convinced it is impossible to do so completely. Secondly, the *ancilla* position cannot be reconciled with the commonly heard criticism that it is canon law which makes theological progress impossible in practice. If canon law truly is an *ancilla*, it has no unique or independent role to play in theology or Church policy. A third remark, challenging the purity of the *ancilla* function, was formulated by Barion himself, who asserted that *auctoritas, non theologia, facit dogma*. This means that the way from theology to canon law always needs Church authorities as mediator, a position which is not denied by John Paul II. Briefly summarized, the *ancilla* function contains problematic elements, yet it is also commonly used. We will analyze it in greater depth below.

The second function of canon law for Barion is as *custos theologiae*. Canon law is not only a servant but also a custodian of theology. Thomas Neumann rightly sees this function as a defensive one and highlights an often forgotten, problematic aspect associated with it.<sup>4</sup> Indeed, when it is the

<sup>2</sup> Hans BARION and Werner BÖCKENFÖRDE (eds.), *Kirche und Kirchenrecht: gesammelte Aufsätze*, Paderborn, Schöningh, 1984, 341-403.

<sup>3</sup> JOHN PAUL II, Apostolic constitution for the promulgation of the new code of canon law *Sacrae disciplinae leges*, 25 January 1983, in AAS, 75/II (1983), xix.

<sup>4</sup> NEUMANN, "Vom Inneren zu äusserem Dialog," 16.

function of canon law to protect the *donum relevatum*, namely the object of revelation, then the *donum relevatum* is not given in a static way but only appears gradually during Church history. Silvio Ferrari writes: “Human capacity to understand the divine law is limited: therefore, it is always possible to improve understanding of what God really meant.”<sup>5</sup> As a result, canon lawyers cannot give a definitive answer concerning the exact content of the *donum relevatum*. This task is equally impossible for individual theologians but must be attributed to a larger notion of *auctoritas* in theology that is not completely visible yet. In that regard, it is understandable that another well-known German canon lawyer of the last century, Johannes Neumann, sees the salvation of souls as the only goal of canon law, rejecting other sources as inadequate.<sup>6</sup> One can argue that the *salus animarum* is by definition flexible, whereas the *custos theologiae* gives the impression of being immovable, reflecting the truth, although by definition it cannot be definitive yet. What is apparent is that canon law as *custos theologiae* does not fully recognize the idea of revelation in all its aspects, especially the more creative ones.

The third function of canon law set forward by Barion is *illuminatrix theologiae*. According to Barion, it is possible that, during a discussion on canonical issues, open questions emerge. If these questions are not merely legal or technical, the Magisterium must be consulted for the ultimate answer. Consequently, *illuminatrix* refers to a situation in which a canonical discussion reveals an underlying theological problem that must be submitted to those mandated to offer a final solution. By revealing the *illuminatrix* role, the canon lawyer helps refine our understanding of the *donum revelatum*. Moreover, the idea of canon law as *illuminatrix theologiae* confirms the position of canon law as a *locus theologicus*.

In the following sections, I shall use the tool developed by Barion to comment on three important issues in current Church life, on which Pope Francis expressed clear views. The first issue is marriage law. In the *motu proprio Mitis Iudex* of 15 August 2015,<sup>7</sup> Pope Francis tries to facilitate declarations of matrimonial nullity. Did the Pope limit himself merely to

<sup>5</sup> Judith HAHN, *Grundlegung der Kirchenrechtssoziologie. Zur Realität des Rechts in der römisch-katholischen Kirche*, Wiesbaden, Springer VS, 2019, 134 (= HAHN, *Grundlegung der Kirchenrechtssoziologie*). She quotes Silvio FERRARI, “Canon Law as a Religious Legal System,” in Andrew HUXLEY (ed.), *Religion, Law and Tradition. Comparative Studies in Religious Law*, Abingdon, Routledge, 2002, 52.

<sup>6</sup> Johannes NEUMANN, *Grundriss des Kirchenrechts*, Darmstadt, Wissenschaftliche Buchgesellschaft, 1982, 26 ff.

<sup>7</sup> FRANCIS, Apostolic letter *Mitis Iudex Dominus Iesus*, 15 August 2015, in AAS, 107 (2015), 958-967 (= FRANCIS, *Mitis Iudex Dominus Iesus*).

canonical changes, or did he also amend the underlying theology with regard to indissolubility, even while expressly saying the opposite? If the latter is true, how does the canonical system incorporate the new insights into an existing system? Does it operate as an *ancilla*, a *custos*, or an *illuminatrix*?

The second issue concerns possible changes to Church policy or administration as set forth, among others, by the *Synodaler Weg* initiated in Germany in 2018. What about the propositions formulated as a result of the synodal process? Can they be integrated in theology as held by the Magisterium and, if so, how? How does canon law address their implementation? Some of these questions are answered implicitly in the 2020 instruction of the Congregation for the Clergy on the pastoral conversion of the parish community in the service of the evangelising mission of the Church.<sup>8</sup> But, what does Pope Francis mean by “missionary” for the Church in highly secularized countries?

The third issue concerns the position of Pope Francis with regard to sexual relationships outside a canonically recognized marriage. In the apostolic exhortation *Amoris laetitia*, Francis created an opening for divorced, civilly remarried Catholics.<sup>9</sup> Moreover, in the 2020 documentary *Francesco* by director and producer Evgeny Afineevsky, the Pope seemed to advise same sex couples to choose a civil registered partnership to secure their material position.<sup>10</sup> What does this mean canonically? On 22 February 2021, the Congregation for the Doctrine of the Faith (CDF) issued a *responsum* to a *dubium* regarding the blessing of the unions of persons of the same sex, rejecting the practice because sexual intercourse outside marriage is sinful.<sup>11</sup> Here again, the relationship between the position of the Pope, traditional theological teaching, and the role of canon law is at stake. Is canon law here an *ancilla* and, if it is, of whom? Is it a *custos* and, if so, of what? Or can it be considered as an *illuminatrix* and, in that case, who gives the final answer?

<sup>8</sup> CONGREGATION FOR THE CLERGY, Instruction on the Pastoral Conversion of the Parish Community in the Service of the Evangelising Mission of the Church, 20 June 2020, <<https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2020/07/20/200720a.html>>, (= CONGREGATION FOR THE CLERGY, Instruction on the Pastoral Conversion of the Parish Community).

<sup>9</sup> FRANCIS, Post-synodal apostolic exhortation on love in the family *Amoris laetitia*, 19 March 2016, in AAS, 108 (2016), 311-512 (= FRANCIS, *Amoris laetitia*).

<sup>10</sup> Evgeny AFINEEVSKY (director), film *Francesco*, Discovery+/ Abramorama, 2020.

<sup>11</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Responsum* to a *dubium* regarding the blessing of the unions of persons of the same sex, <[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20210222\\_responsum-dubium-unioni\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20210222_responsum-dubium-unioni_en.html)>.

At first glance, all three cases seem to be more complicated than the construction set forward by Barion. For instance, a new element seems to emerge, namely, a possible tension between the personal opinion of the Pope and the *donum relevatum* the Pope is supposed to protect. This duality, completely absent in the days of Barion and politically unthinkable during the papacy of John Paul II, is increasingly set forward by well-known theologians and canon lawyers, including Cardinals Gerhard Ludwig Müller and Raymond Leo Burke.

## 2 — *Mitis Iudex and Its Underlying Theology*

In 2015, Pope Francis issued his apostolic letter *motu proprio*, *Mitis Iudex Dominus Iesus*, on the reform of the canonical process for declarations of nullity of marriage. Based on this title, not much theologically seems to be at stake. Even if procedural norms have the reputation of being boring and technical, they may contain a certain charm for canon lawyers. Conversely, they seem to be a waste of time for theological thinkers. Indeed, Francis emphasized that the changes were strictly juridical, not doctrinal,<sup>12</sup> in that the indissolubility of marriage cannot be questioned.<sup>13</sup> But, is that true in practice?

In a remarkable analysis of the *motu proprio*, Roch Pagé comes to the conclusion that the canonical modifications are not as harmless as they are presented. For example, Pope Francis made a briefer nullity process before the bishop possible, as long as moral certainty about the nullity could be guaranteed.<sup>14</sup> The circumstances of things and persons that can allow a case for nullity of marriage to be handled by means of this process include:

... the defect of faith which can generate simulation of consent or error that determines the will; a brief conjugal cohabitation; an abortion procured to avoid procreation; an obstinate persistence in an extraconjugal relationship at the time of the wedding or immediately following it; the deceitful concealment of sterility, or grave contagious illness, or children from a previous relationship, or incarcerations; a cause of marriage completely extraneous to married life, or consisting of the unexpected pregnancy of the woman, physical violence inflicted to extort consent, the defect of use of reason which is proved by medical documents, etc.<sup>15</sup>

<sup>12</sup> Roch PAGÉ, “Questions regarding the Motu Proprio *Mitis Iudex Dominus Iesus*,” in *Jur*, 75 (2015), 608 (= PAGÉ, “Questions regarding the Motu Proprio”).

<sup>13</sup> FRANCIS, *Mitis Iudex Dominus Iesus*, IV.

<sup>14</sup> *Ibid.*, art. 12.

<sup>15</sup> *Ibid.*, art. 14.

This list is surprising, since some of these circumstances do not correspond to existing grounds for nullity. Moreover, several are extremely vague, such as “the defect of faith.” Pagé rightly observes: “we do not currently have a ‘fideo-meter’ to assess the degree of faith needed to perform a sacramentally valid marriage.”<sup>16</sup> Finally, the list is not taxative, given that it concludes with “etc.” Yet, the list and the role of the bishop as sole judge leads to a much more far-reaching conclusion, again described by Pagé. On the one hand, Pope Francis clearly states that the reform of the marriage nullity process is not to be perceived as granting Catholic divorces.<sup>17</sup> On the other hand, “one can say that some marriages will be presumed invalid, and so the presumption of canon 1060 will be overturned and it is its validity that has to be proven.”<sup>18</sup>

Every practising lawyer knows that the burden of proof is extremely important. The one who has to deliver the proof often finds him or herself in a difficult position. Already in Roman law, the importance of the burden of proof was fully recognised, as illustrated by the maxim *actori incumbit probatio*. I recall some ideas elaborated by Dutch Jesuit Piet Huizing (1911-1995) in the period between the Council and the Code. Huizing suggested dealing with the parties and the defender of the bond on equal footing, which meant that a marriage would no longer enjoy the presumption of validity, nor would the presumption of invalidity be acknowledged. Arguments for or against validity would have an equal starting position. Huizing was not successful with this proposition but, in practice, *Mitis Iudex* seems to go beyond what even Huizing dared to suggest. What does this mean concretely?

Let us return to the principles that Barion set forth. In *Mitis Iudex*, is canon law the *ancilla*, the servant of theology? Apparently, it is not because, according to Pope Francis, theology, including the doctrine of the indissolubility of marriage, remains unchanged. This is unusual, as a *motu proprio* tends to develop underlying theological ideas before it comes to the canonical norms.<sup>19</sup>

Can canon law be seen then as theology’s *custos*, its protector? At first glance, this does not seem to be the case either. If the *favor iuris* of canon 1060 finds itself overturned, as Pagé argues, the indissolubility of marriage is less “protected” than before the *motu proprio*.

<sup>16</sup> PAGÉ, “Questions regarding the Motu Proprio,” 610.

<sup>17</sup> *Ibid.*, 609.

<sup>18</sup> *Ibid.*, 614.

<sup>19</sup> *Ibid.*, 610.

Finally, what of canon law as *illuminatrix theologiae*, identifying an underlying theological problem that can only be solved by consulting the Magisterium? It is hard to opt for this interpretation, as the Pope himself has denied any doctrinal change or problem.

A possible conclusion could be that Pope Francis wants to facilitate annulments without endangering the principle of the indissolubility of marriage, something which is not easy. He is in search of a practical, legal solution, while leaving the underlying principle of indissolubility intact. Pope Francis recognizes that a direct amendment of that principle would lead to vigorous protest; yet, I think that there is a doctrinal change, albeit a subtle one. Pope Francis does not *abandon* the principle of indissolubility, but he gives it a new status. It is no longer a principle that should be legally protected by all means. As a result of *Mitis Iudex*, the idea of indissolubility remains unchanged, yet it becomes an ideal instead of a legal reality. This is partly due to the legal evolution of the last decades, but it is also due to the theological vision of Pope Francis, whose idea of *proximity* to the faithful<sup>20</sup> diminishes the legal rigidity of indissolubility.

This analysis can lead to two conclusions. First, the tool of analysis that Barion offers is more effective than one may assume at first glance. In *Mitis Iudex*, canon law is—in a subtle way—the *ancilla* of the theology held by Pope Francis. Secondly, the relationship between theology and canon law is not immediately apparent in the *motu proprio*; it is up to the reader to develop it.

### **3 — The Synodaler Weg and the 2020 Instruction of the Congregation for the Clergy**

The *Synodaler Weg* (Synodal Path), initiated on 1 December 2019, is a series of conferences on critical issues in the German Catholic Church. Four main subjects are at stake: power and separation of powers in the Church, serial marriage and other sexual relationships, priestly life today, and women in ministries and offices of the Church. The *Synodaler Weg* offers a unique opportunity to discuss issues that have remained unsolved for almost half a century. Some see it as a last chance for the Church to regain broad credibility, at least in a country like Germany. However, it is likely that certain desires expressed will be incompatible with universal law and Church teachings. Some topics—including women's ordination, sexual activity outside of

<sup>20</sup> FRANCIS, *Mitis Iudex Dominus Iesus*, 6.



marriage, and optional celibacy for priests—are clearly regulated by universal law. This is also true for parish structures relative to the principle of territoriality, the role of the pastor as *pastor proprius*,<sup>21</sup> and the participation of lay persons in the exercise of the power of governance.<sup>22</sup>

Yet, different arguments can be made from more recent theological sources. Specifically, one may consider the apostolic exhortation *Evangelii gaudium*, issued by Pope Francis in 2013.<sup>23</sup> In this text, he formulates his dream of a “missionary option,” an impulse capable of transforming the Church’s customs, ways of doing things, times and schedules, language and structures for the evangelization of today’s world rather than for self-preservation.<sup>24</sup> Pope Francis favors a mission-oriented Church, “to make ordinary pastoral activity on every level more inclusive and open.”<sup>25</sup> He has an optimistic view of the parish. “The parish is not an outdated institution; precisely because it possesses great flexibility, it can assume quite different contours depending on the openness and missionary creativity of the pastor and the community.”<sup>26</sup> Pope Francis gives the impression that a renewal of existing canonical norms is possible. In this vein, it will be interesting to analyze the instruction on the pastoral conversion of the parish community in the service of the evangelizing mission of the Church, issued by the Congregation for the Clergy in 2020.<sup>27</sup>

At first glance,<sup>28</sup> the instruction shows awareness of changing situations in daily Church life. “The situations outlined in the following Instruction represent a valuable opportunity for pastoral conversion that is essentially missionary.”<sup>29</sup> A later remark by Pope Francis develops this point: “If something could rightly disturb us and trouble our consciousness, it is the fact that so many of our brothers and sisters are living without the strength, light and

<sup>21</sup> Canon 519 *CIC/83*.

<sup>22</sup> Canons 129 and 274 *CIC/83*. Canon 129 § 2 says that lay members of the faithful may “cooperate” in the exercise of the power of governance, leading some to conclude that they may not “participate” in its exercise.

<sup>23</sup> FRANCIS, Apostolic exhortation on the proclamation of the gospel in today’s world *Evangelii gaudium*, no. 287, 24 November 2013, in *AAS*, 105 (2013), 1136 (= FRANCIS, *Evangelii gaudium*).

<sup>24</sup> *Ibid.*, no. 27.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, no. 28

<sup>27</sup> CONGREGATION FOR THE CLERGY, Instruction on the Pastoral Conversion of the Parish Community, cited at note 8 above.

<sup>28</sup> For further discussion, see Rik TORFS, “Canon Law and the Particular Church. New Developments,” in *Omaggio Arrieta*, 783-799, to be published.

<sup>29</sup> CONGREGATION FOR THE CLERGY, Instruction on the Pastoral Conversion of the Parish Community, no. 2.

consolation born of friendship with Jesus Christ, without a community of faith to support them, without meaning and a goal in life.”<sup>30</sup> There is also a cautious but firm acknowledgement of the limits of territoriality.

The territorial configuration of the Parish, however, must confront a peculiar characteristic of our contemporary world, whereby increased mobility and the digital culture have expanded the confines of existence. On the one hand, people are less associated today with a definite and immutable geographical context, living instead in ‘a global and pluralist village’; on the other hand, the digital culture has inevitably altered the concept of space, together with people’s language and behaviour, especially in younger generations.<sup>31</sup>

Here the instruction drifts away from the quasi-monopoly of territoriality which remains in the *CIC* 1983.

Another remarkable aspect of the instruction is the explicit language used to curtail the bishop in the exercise of his executive power. To put it another way, the new situation of the particular Church, including its missionary status, does not give *carte blanche* to the bishop to develop policy along the lines of his own theological or strategic options. Yet, when one turns to the strictly canonical part of the document, it merely repeats the norms of the *CIC* 1983. Consequently, the novelties expressed by the instruction, including the missionary character of the Church and the new understanding of territoriality, do not find themselves translated into their ultimate canonical consequences. There is no real link between the concept of a missionary Church, which is new, and the norms called upon to bring it into practice, which are old. Indeed, the instruction focuses more on the limitations of the Code of Canon Law than on its possibilities.

For example, numbers 87-89 of the instruction deal with canon 517 §2: “If, because of a lack of priest the diocesan priest has decided that participation in the exercise of the pastoral care of a parish is to be entrusted to a deacon, to another person who is not a priest, or to a community of persons, he is to appoint some priest who, provided with the powers and the faculties of a pastor, is to direct the pastoral care.” The instruction is clear about the exceptional character of the role lay people can be given: it should be a temporary and not a permanent measure. The reason should be *ob sacerdotum penuriam*, not for convenience or “advancement of the laity.” Moreover, lay people can never take the role of directing, coordinating, moderating, or governing the parish. These competencies belong to the priest alone.

<sup>30</sup> Ibid., no. 3. FRANCIS, *Evangelii gaudium*, nos. 166-167.

<sup>31</sup> CONGREGATION FOR THE CLERGY, *Instruction on the Pastoral Conversion of the Parish Community*, no. 8.

It is true that these conclusions can be derived from canon 517, yet they are not formulated as such in the latter.<sup>32</sup>

Let us return to the threefold role of canon law set forward by Barion, starting with the concept of canon law as *ancilla* of theology. This is—as far as the missionary ideas of Pope Francis are concerned—certainly not the case in the instruction. The text mentions them in the introductory remarks, yet abandons them entirely when it comes to practical norms. It confines itself to a confirmation of the legal situation as expressed by the Code. Thus, the instruction is by no means an *ancilla* of *Evangelii gaudium*.

The second function of canon law formulated by Barion, the more defensive *custos* role, is present with regard to the old theological presuppositions, including the theory, espoused by some canonists, that there is a direct relationship between the power of governance and the power of order. One can argue that the instruction “defends” the existing theology against the new ideas of Pope Francis, as the latter are never translated into canonical language. In this sense, what happens in the instruction is the opposite of what *Mitis Iudex* managed to do. In the instruction, the new theological approach by Pope Francis is acknowledged, but with scant canonical consequences. In *Mitis Iudex*, the doctrine of the indissolubility of marriage remains unchanged, but the legal norms in practice render marriage less indissoluble.

What about the third function set forward by Barion, canon law as *illuminatrix theologiae*? It does not apply in the sense of the revelation of a theological problem followed by a consultation of the Magisterium to solve it. Yet, the instruction does make a choice in favor of earlier theological ideas underpinning the *CIC*, against the “missionary” renewal suggested in *Evangelii gaudium*. Whereas Pope Francis managed to penetrate the legal system through his idea of *proximity* in *Mitis Iudex*, the *missionary* concept in the 2020 document fails to do this. However, Cardinal Walter Kasper welcomed the instruction as a success,<sup>33</sup> because potential candidates to ordination saw their specific position clarified and strengthened. Conversely, some German bishops involved in the synodal path expressed their disappointment in the lack of realism in the document.<sup>34</sup>

<sup>32</sup> The term *moderari* in canon 517 §2 sounds much more welcoming with regard to the priest who is ultimately responsible for the parish.

<sup>33</sup> S.N., *Cardinal Kasper Defends Vatican Instruction on Parishes*, 20 July 2020, *National Catholic Register*, <<https://www.ncregister.com/news/cardinal-kasper-defends-vatican-instruction-on-parishes>>.

<sup>34</sup> S.N., *German bishops continue debate over Vatican document on parishes*, 28 July 2020, *The Pilot*, <<https://www.thebostonpilot.com/article.asp?ID=188140>>, last accessed on 29 April 2021.

#### 4 — *Sexuality outside Marriage*

Shortly after his election, Pope Francis showed openness to the aspirations of gay people, commenting to journalists on a flight: “Who am I to judge?”<sup>35</sup> This gave hope to many, even though it was just an oral remark without a specific theological, let alone canonical, status. Later, in the 2016 post-synodal exhortation *Amoris laetitia*, Pope Francis warns against overly idealistic ideas on marriage, stating that pastors must find ways to welcome Catholics living in “irregular” relationships. In a footnote, he notes that, in some cases, people whose relationships are not blessed by the Church may find themselves called to receive the sacraments.<sup>36</sup> This viewpoint is contrary to the position of the apostolic exhortation *Familiaris consortio*, issued in 1981 by Pope John Paul II,<sup>37</sup> as well as the traditional interpretation of canon 915 of the *CIC*, which states: “Those who have been excommunicated or interdicted after the imposition or declaration of the penalty and others obstinately persevering in manifest grave sin are not to be admitted to holy communion.” Consequently, some canon lawyers, including Jean Werckmeister, have argued that “irregular” relationships do not necessarily imply a grave sin and refusing persons in them the opportunity to receive Communion would cause scandal.<sup>38</sup>

A 2000 declaration by the Pontifical Council for Legislative Texts, however, confirmed the traditional viewpoint that Catholics who are divorced and civilly remarried cannot receive Communion.<sup>39</sup> This led Cardinals Raymond Burke, Carlo Caffarra, Walter Brandmüller, and Joachim Meisner to ask Pope Francis to clarify his position because they have noted “a grave disorientation and great confusion of many faithful regarding extremely important matters for the life of the Church.”<sup>40</sup> At the heart of the issue is the notion of sin, as the Cardinals note: “After *Amoris Laetitia* (n. 301) is it still possible to affirm that a person who habitually lives in contradiction to a commandment of God’s law, as for instance the one that prohibits adultery (cf. Mt 19.3-9), finds him or herself in an objective situation of grave habitual

<sup>35</sup> S.N., *Pope Francis: Who am I to judge gay people?* 28<sup>th</sup> of July 2020, *BBC News*, <<https://www.bbc.com/news/world-europe-23489702>>.

<sup>36</sup> *Ibid.*, no. 305.

<sup>37</sup> JOHN PAUL II, Apostolic exhortation *Familiaris consortio*, no. 11, in *AAS*, 74 (1982), 91-92.

<sup>38</sup> JEAN WERCKMEISTER, “L’accès des divorcés remariés aux sacrements,” in *RDC*, 48 (1998), 59-79.

<sup>39</sup> PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Declaration, 24 June 2000, in *Comm*, 32 (2000), 159-162.

<sup>40</sup> Full text: *Cardinals’ letter to Pope Francis on Amoris laetitia*, 14 November 2016, *Catholic Herald*, <<https://catholicherald.co.uk/full-text-cardinals-letter-to-pope-francis-on-amoris-laetitia/>>, last accessed on 29 April 2021.

sin (cf. Pontifical Council for Legislative Texts, Declaration, June 24, 2000)?”

Going back to the three functions of canon law set forward by Barion, we can conclude that all three are present in the letter sent by the Cardinals. First, they clearly advocate the idea of canon law as *ancilla* of theology. The notion of sin as theologically determined is normative for canon law, so the acceptance of sinners to Communion is impossible. Secondly, the cardinals see canon law as a *custos* against erroneous ideological ideas, even if they seem to come from the Pope himself. Third, canon law as an *illuminatrix theologiae* is present in the technique used by the cardinals. The *dubia* they raise express apparent tensions between theological roots and canon law, and it belongs to the Magisterium to bring clarity. Yet, although the four cardinals leave the answer formally to the Pope—consistent with Barion’s model—it is apparent they are convinced that, if Pope Francis does not adhere to the solution they suggest, he places himself outside tradition. This becomes transparent in the final paragraph of their letter: “God’s commandments are a most welcome help for conscience to get to know the truth and hence to judge verily. God’s commandments are the expression of the truth of our good, about our very being, disclosing something crucial about how to live the life well.” Pope Francis also expresses himself in these terms in *Amoris laetitia*: “The law is itself a gift of God which points out the way, a gift for everyone without exception.”<sup>41</sup>

The standing of homosexual unions has been compared to the one of divorced and civilly remarried Catholics. As mentioned above, the Pope suggested in a 2020 documentary film *Francesco* that people in a homosexual union could find material stability by entering a civil partnership. Of course, he could not recommend a civil marriage, as marriage is reserved to a man and a woman. Yet, by suggesting the possibility of a legal partnership, Pope Francis seems to accept sexual activity outside marriage. Some cardinals immediately saw the possible problem. For example, the Cardinal Archbishop of Boston was quick to assert that Pope Francis’ support for same sex unions did not equate to an endorsement of homosexual activity. A similar interpretation came from Mexican Archbishop Franco Coppola: “It’s clear that Pope Francis was referring to certain arrangements by states, certainly not to Church doctrine, which has often been reaffirmed over the years.”<sup>42</sup> Cardinal Gerhard Müller bluntly told the Italian *Corriere della Sera*: “The

<sup>41</sup> FRANCIS, *Amoris laetitia*, no. 295.

<sup>42</sup> S.N., *Vatican says Pope’s backing for gay unions no challenge to marriage*, 14 November 2016, *Bangkok Post*, <<https://www.bangkokpost.com/world/2013147/vatican-says-popes-backing-for-gay-unions-no-challenge-to-marriage>>.

pope is not above God's word."<sup>43</sup> Müller clearly follows the same reasoning as the four *dubia*-cardinals, by contrasting the word of God and his commands to the doctrinal position of the Pope.

There is a clear difference, however, between the way the *dubia* were dealt with by Pope Francis and the answer given to the issue of homosexual relationships. The four cardinals never obtained answers, and the Pope maintained the position he articulated in *Amoris laetitia*. However, with regard to homosexuality, the *responsum* given in 2021 by the CDF to a *dubium* regarding the blessing of the unions of persons of the same sex can be seen as a return to the position advocated by the *dubia*-cardinals.<sup>44</sup> The *responsum* states that the Church does not have the power to bless unions of persons of the same sex. Referring to the catechesis of Pope Francis himself, the document asserts that God does not and cannot bless sin, although he can bless sinful people. For that reason, the Church cannot bless unions of persons of the same sex. Thus, the *responsum* confirms that sexual relationships of people of the same sex are always sinful, as is all sexual intercourse outside of marriage. To put it another way, the theology of Pope John Paul II in *Familiaris consortio* was victorious over the perspective of Pope Francis in *Amoris laetitia*. Paul Elie summed this up in *The New Yorker* with the title, "The Vatican's giant step backwards on same sex unions," followed by the subtitle, "A scathing Church ruling leaves Catholics wondering what Pope Francis really thinks."<sup>45</sup>

## 5 — The Theory of Hans Barion and Pope Francis Deeper Analysis

Several conclusions can be drawn from these case studies. It is obvious that the tool developed by Barion is useful, in that the role of canon law as *ancilla*, *custos*, and *illuminatrix theologiae* is often present. At times, canon

<sup>43</sup> Gian Guido VECCHI, *Il cardinale Müller: "Unione civili per le coppie omosessuali? Io sono leale al Papa ma non è al di sopra della parola di Dio,"* <[https://www.corriere.it/cronache/20\\_ottobre\\_22/unioni-civili-io-sono-leale-papama-non-di-sopradella-parola-dio-a9000df0-14a2-11eb-945d-f4469a203703.shtml](https://www.corriere.it/cronache/20_ottobre_22/unioni-civili-io-sono-leale-papama-non-di-sopradella-parola-dio-a9000df0-14a2-11eb-945d-f4469a203703.shtml)>.

<sup>44</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Responsum* to a *dubium* regarding the blessing of the unions of persons of the same sex, <[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20210222\\_responsum-dubium-unioni\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20210222_responsum-dubium-unioni_en.html)>.

<sup>45</sup> S.N., *The Vatican's Giant Step Backward on Same-Sex Unions*, 14 November 2016, *The New Yorker*, <<https://www.newyorker.com/news/daily-comment/the-vaticans-giant-step-backward-on-same-sex-unions>>, last accessed on 29 April 2021.

law seems to be a humble servant, yet it can also be a fierce guardian, and the idea of *illuminatrix theologiae* certainly plays a hidden part. However, a different conclusion can be drawn by looking at these situations from another angle. What becomes apparent is that Pope Francis is less able to translate his viewpoints into legislation than he was earlier in his pontificate. Indeed, the oldest case is *Mitis Iudex*. While most canon lawyers are unimpressed by the canonical quality of the text, it remains a daring document in which Pope Francis manages to change the law, albeit subtly, without putting into question its traditional doctrinal basis. Marriages can be declared invalid more easily, yet the principle of indissolubility is unquestioned. Thus, while *Mitis Iudex* was criticized by canon lawyers,<sup>46</sup> little was heard in other ecclesiastical circles.

Pope Francis was less successful in his plea for a *missionary* parish life. Although he developed innovative ideas in *Evangelium gaudium*, he failed to translate the exhortation into canonical norms. The 2020 instruction of the Congregation for the Clergy does not reflect many missionary elements. Whereas, in *Mitis Iudex*, Pope Francis translated his notion of *proximity* into legal norms, the 2020 instruction did not give any legal consequence to the idea of a *missionary* parish. Between 2015 and 2020, canonical norms became much less an *ancilla* of the theological ideas formulated by Pope Francis.

With regard to sexual relationships outside marriage, we can see a clear evolution within one realm. With *Amoris laetitia* in 2016, Pope Francis created an opening for the acceptance of some stable sexual relationships, as with civil unions. Yet, in 2021, this opening was closed as a result of the *responsum* by the CDF with regard to the blessing of homosexual unions. While a *responsum* is not a major document, it was signed by the Cardinal Prefect, Luis Ladaria Ferrer. Moreover, Pope Francis gave his consent to the publication of the text. Clearly, between 2016 and 2021, the Pope became less successful in transforming his ideas into canonical norms. One reason is the fierce opposition he had to endure, which raises questions with regard to the infallibility of the Pope when he speaks *ex cathedra* about faith and morals. Can there be a tension between the Pope speaking *ex cathedra* and the word of God? Perhaps the late Hans Küng was not entirely wrong in problematizing the issue of infallibility.

<sup>46</sup> See also Hildegard WARNINK, "The Motu Proprio *Mitis Iudex Dominus Iesus*: Opportunities, Challenges and Potential Pitfalls," in *Concilium: International Journal of Theology*, no. 5 (2016), 90-100.

### ***Conclusion*** ***Hans Barion Revisited***

The triple function of canon law formulated by Barion remains an interesting tool to analyze the relationship between theology and canon law. However, what remains absent in his theory is the internal relationship between the three different functions. Canon law can be *ancilla*, *custos*, and *illuminatrix theologiae*, but not always to the same extent. In one case the *ancilla* role may prevail; in another, canon law functions more as a *custos*; and at times the role of *illuminatrix theologiae* tends to be dominant. This is likely because the relationship between theology and canon law almost never exists in its pure form. Other components also play a part, including epistemological questions with regard to the notion of truth. Yet, political arguments play a part as well, as do trends in theology and canon law, as well as the sociological context. Four primary elements influence the threefold relationship between theology and canon law described by Barion.

First, since Vatican II, theology has tended to neglect its possible canonical consequences. This point has been further developed by German canonist Werner Böckenforde.<sup>47</sup> Experts in pastoral theology or ethics often developed theory without thought to possible canonical consequences. The result of this seemingly progressive idea was the confirmation of a canonical status quo. As new ideas did not involve the normative part of the Church system, the latter could remain more or less unchanged. This phenomenon explains why some forms of ostensibly “progressive” theology led to the maintenance of a conservative canonical framework. Many opportunities have been missed. The fact that a *lex ecclesia fundamentalis*, including the formal supremacy of the obligations and rights of the Christian faithful, was never issued can be seen as a victory of anti-juridical thinking, but also as a defeat of the protection of rights of Christian faithful. The presupposition of Barion and his theory go in the other direction. They consider the relationship between theology and canon law to be obvious. When this is no longer the case, Barion’s system becomes less effective.

A second problem is the relationship between ethics and law.<sup>48</sup> In a system like canon law, an ethical component will always be present, but the question remains as to whether that component should always be translated into positive norms. Law concerns the *forum externum*, the field of visible acts and deeds, whereas ethics focus on the *forum internum*, where intentions

<sup>47</sup> HAHN, *Grundlegung der Kirchenrechtssoziologie*, 91.

<sup>48</sup> *Ibid.*, 131.



play a large part and the notion of sin is a key issue. The *CIC* manages to a large extent to separate these two fora and, when it fails, problems tend to occur. For example, canon 915 occupies a central position in many legal discussions. What does the law mean when it refers to a situation of someone “obstinately persevering in manifest, grave sin”? In this case, closed theological concepts are the *custos* of the old legal system. Because theology intrudes into canon law, when the Pope changes norms, he is not a mere legislator, but he potentially “betrays” the very command of God as expressed in the notion of sin.

A third element influencing the relationship between theology and canon law seems to be theological at first glance, but it is probably more philosophical. How do we deal with unchangeable, eternal concepts coming from God? To what extent can canon law evolve into previously unforeseen directions?<sup>49</sup> Canon law is a non-transcendental norm that has to express and deal with the transcendental. Thus, there is a continuous need for interpretation, even if norms seem to be rooted in the will of God. Joseph Khoury observes: “To answer the question of how it is possible that something that was (or was claimed to be) of divine law can be suppressed, some would hold that these are references to interpretation of divine law, and that what has been suppressed are only interpretations.”<sup>50</sup> Consequently, theologians must be aware that their ideas on unchangeable norms can be partly theological, but they cannot be disconnected from their implicit philosophical underpinning.

A fourth element influencing the relationship between theology and canon law is the political impact that certain theological concepts have once translated into canon law. A good example of the latter is offered by Judith Hahn.<sup>51</sup> When Pope John Paul II, in his letter *Ordinatio sacerdotalis*, wrote that the ordination of women to the priesthood is impossible because of the divine constitution of the Church, he left open whether ordination to the diaconate could be possible. Pope Francis reactivated the discussion on that issue by installing a commission that presented a report which failed to offer much clarity.<sup>52</sup> Subsequently, Pope Francis tasked a new commission to

<sup>49</sup> Ibid., 133.

<sup>50</sup> Joseph J. KHOURY, “Ius divinum as Canonical Problem. On the Interaction between Divine and Ecclesiastical Laws,” in *Jur*, 53 (1993), 118.

<sup>51</sup> HAHN, “Grundlegung der Kirchenrechtssoziologie,” 142.

<sup>52</sup> Pope Francis established the *Study Commission on the Women’s Diaconate* in August 2016. This commission had to investigate the theology and history of the ministry of women deacons. Furthermore, the commission members had to review the question of whether women might be allowed to become deacons in the Roman Catholic Church today.

examine the issue in greater depth. Of course, in case the outcome leads to the possibility of female deacons, the debate on women priests will be reopened, even if Pope John Paul II tried to close it definitively. So, the authorization of female deacons cannot be confined to the problem of female deacons alone. This is not necessarily the case theologically; it is from a broader perspective of Church policy.

The conclusion of the implementation of Barion's ideas to current issues emerging in the Church illustrates that the tool he developed remains valuable. At the same time, it is too pure to be true. The reality includes the complex relationship between theology and some aspects of canon law, the philosophical underpinning of the debate, as well as some Church political considerations. Of course, theology and canon law are both involved, but behind all the theological concepts and polite formulas used to express them, other issues do play an important part. These include political struggle within the Church, which has always existed and will never disappear, as the Church of Christ is also a Church of human beings.

## ÉPILOGUE — EPILOGUE

*Father Francis G. Morrissey, O.M.I. is the 2019 recipient of the Lifetime Achievement Award of the Catholic Health Association of the United States. The award was conferred on 10 June 2019 during the annual Catholic Health Assembly in Dallas, Texas. For that occasion, Frank composed the following reflection, a letter to his younger self. These reflections remain an inspiration to so many of us!*

### ***A LETTER TO MY YOUNGER SELF***

Dear Frank,

You were born in Charlottetown, Prince Edward Island, Canada, the oldest of five children—just before the start of World War II. Having a father in the Army, you'll move from place to place.

You'll attend Mass daily, praying for the end of the War, and then for lasting peace.

Your parents will teach you the value of money; that if you wished to have something, you'll have to work for it, so that you'll appreciate it.

University will bring awareness. It will be a first spark of recognition of the extreme positions in the Church.

You'll seek guidance from another priest, who tells you to learn how to situate yourself at *slightly left of center*.

The Sixties will offer you the same radical notions as much of the world was experiencing.

Ordained shortly after St. John XXIII announced that an ecumenical council would be held and it will require a choice to be made, and you'll make it joyfully: either remain in the past and reject all the coming changes; or, try to espouse what is being proposed and see how you can further its thrust.

You'll take from the conciliar debates a key lesson: that the promotion of the dignity of the human person is primordial.

When the encyclical, *Humanae vitae*, is issued by St. Paul VI, you will feel dazed as people begin to overtly criticize the Pope and withdraw in large numbers from the church. It will challenge you but you'll choose not to dissent; to remain faithful to the Pope and his teachings.

You'll come to see *Humanae Vitae* as the encyclical that opens an unexpected world of thought to you: the role that personal conscience plays in the forming of a moral decision.

But your ministry as a canonist will also lead you to new life; new directions as you try to delve into new canonical structures to respond to parishes having to be closed and religious institutes realizing their ministry is nearing completion. This work will usher in a new acceptance of the role of the laity. You'll believe lay persons could—and should—assume a significant and rightful place in the Church's ministry, especially in areas of governance related to health care, education, and social services. You'll work tirelessly to help ministries develop structures that will enable them to flourish into the future, serving those on the margins; protecting the dignity of each human person.

Your priestly ministry is joy filled. You use your Canon Law skills to assist people, especially those who no one else can help.

You'll come to understand a few things:

First, don't bother starting with the statement, "You cannot do this or that. It is against Canon Law!!!"

A second point, develop and keep a sense of humour.

Thirdly, as the last words of the Code of Canon Law sum it all up: "the supreme law is the salvation of souls."

Fourthly, Do. Not. Be. Afraid. There is a tomorrow, although we have no idea what it will hold. Do your utmost to be involved in shaping tomorrow—which will soon be here.

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A video of Father Morrissey reading this letter is available at:  
<https://www.youtube.com/watch?v=7-QrX8Wgahk&t=25s>

## NOTES BIOGRAPHIQUES BIOGRAPHICAL NOTES

ARRIETA OCHOA DE CHINCHETRU, Juan Ignacio

Bishop Juan Ignacio Arrieta Ochoa de Chinchetru (Vitoria, Spain 1951) is the Secretary of the Pontifical Council for Legislative Texts since 2007. Professor emeritus of the Faculty of Canon Law of the Pontifical University of the Holy Cross in Rome and of the Faculty of Canon Law of St. Pius X in Venice, of which he was founding Dean in 1984 and 2003. Director of the canonical journal “*Ius Ecclesiae*” (1989-2002), he currently directs the journal “*Communicationes*.” Consultant and judge of various dicasteries of the Roman Curia and of the Vatican City State since 1986. He is the author of numerous works on canon law, ecclesiastical law of the State and Vatican law, and has edited several annotated editions of the Code of Canon Law since 1983. He has recently published a *Course on Vatican Law* (“*Corso di diritto vaticano*,” Rome 2021) and a repertory of current Vatican laws, *Code of Vatican Norms* (“*Codice di norme vaticane*,” Rome, 2021).

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Professor Anne Asselin completed her canon law studies at Saint Paul University, Ottawa, Canada (JCL, 1996; JCD, 2003). She worked at the Ottawa Ecclesiastical Tribunal (1982-1990), and as Vice-Chancellor and then Chancellor and Tribunal Director at the Military Ordinariate of Canada, Ottawa (1990-2000). She has been a professor of Canon Law, Faculty of Canon Law, Saint Paul University, since 2003 and was appointed Dean of the Faculty in 2010 until 2016. She is Vice-Chair of the Board of Directors of the Catholic Health Sponsors of Ontario and serves as a judge at the Canadian Appeal Tribunal.

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Father Brian T. Austin, F.S.S.P. has studied at Vanderbilt University, St. John's College, Annapolis (BA, Philosophy), Our Lady of Guadalupe Seminary (M.Div. equiv.), the University of Ottawa/St-Paul (MCL/JCL), and the Katholieke Universiteit Leuven (PhD/JCD). Since 2017, he has been a member

of the CLSA's committee on institutes of consecrated life and societies of apostolic life. His doctoral dissertation, *The Power of the Congregation for the Doctrine of the Faith to Derogate From Prescription: An Evaluation of the Legality and Justice of the 2002 Rescript*, is forthcoming from Peeters (Leuven, 2022). In addition to his studies, he has been in parish ministry for eleven years and currently serves as chaplain to the Oratory of Saints Philomena and Cecilia in the Archdiocese of Indianapolis, Indiana (USA).

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Sister Nancy Bauer, O.S.B., is a member of the Sisters of the Order of Saint Benedict of Saint Benedict's Monastery, St. Joseph, Minnesota. She earned the licentiate and doctorate in canon law at The Catholic University of America in Washington, D.C. She is an associate professor in the School of Canon Law at The Catholic University of America.

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Father John P. Beal is a priest of the Diocese of Erie, PA. He earned his doctorate in canon law at the Catholic University of America in 1985. After serving as judicial vicar of the Diocese of Erie, He joined the faculty of canon law at The Catholic University in 1992. He is now an ordinary professor and holder of the Stephan Kuttner Chair of Canon Law. He was co-editor of *A New Commentary on the Code of Canon Law* published by Paulist Press in 2000 and has published widely in canonical journals.

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Father James Bradley is assistant professor in the School of Canon Law at The Catholic University of America, and is a priest of the Personal Ordinariate of Our Lady of Walsingham. He holds degrees in music, theology, and canon law, from Bristol, Oxford, London, and The Catholic University of America. He is currently undertaking a doctorate in liturgical studies at the University of Vienna. His research interests include the areas of sacramental and liturgical law.

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Father Patrick Connolly studied at the National University of Ireland (BSc 1983), the Pontifical University Maynooth (BD 1986; STL 1988), the Gregorian University Rome (JCL 1992), the University of Ottawa (PhD 1995), and Saint Paul University Ottawa (JCD 1995). Ordained priest in 1987 for the diocese of Clogher, he has served in parish ministry, as associate judicial vicar of the Armagh Regional Marriage Tribunal, and on the teaching staff

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Monsignor Brendan Daly is a priest of the Diocese of Christchurch who was ordained in 1977. He completed his JCD at Saint Paul University, Ottawa, in 1986 with a thesis concerning infant baptism. He has taught at Holy Cross College from 1987 and was rector of Holy Cross Seminary from 1995-2000. He was a lecturer in canon law at Good Shepherd College—Te Hēpara Pai in 2001 where he became principal in 2002. He is lecturer in canon law at the Catholic Theological College, Auckland. He is a judge on the Tribunal of the Catholic Church for New Zealand.

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Archbishop Brian J. Dunn received a Bachelor of Arts degree and a Master of Divinity degree from the University of Western Ontario, London. He was ordained to the priesthood in 1980 for the Diocese of Grand Falls, Newfoundland and served in pastoral ministry until 2002. He received a Licentiate and Doctorate in Canon Law from Saint Paul University, Ottawa (1991), and a Masters of Arts (Liturgical Studies) from the University of Notre Dame, Indiana (2006), and served his diocese as chancellor, associate judicial vicar, and canonical advisor. His teaching experience includes lecturer for the Atlantic School of Theology in the Diploma in Theology and Ministry Program (six years in the 1990s), lecturer at the Faculty of Canon Law at Saint Paul University, Ottawa (2003-2004), and associate professor at St. Peter's Seminary, London, Ontario (2002-2008). He received episcopal ordination in 2008 and served as Auxiliary Bishop of Sault Ste Marie (2008-2010), Bishop of Antigonish (2010-2019), Coadjutor Archbishop of Halifax-Yarmouth (2019-2020), Archbishop of Halifax-Yarmouth (2020-Present).

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John M. Huels was born in St. Louis, Missouri on 13 November 1950. His studies include: B.A. in psychology and philosophy from St. Louis University, St. Louis, Missouri, 1971; M.A. in theology, M.Div. from Catholic Theological Union, Chicago, Illinois, 1976; J.C.D. from The Catholic University of America, Washington, D.C., 1982. He has been assistant professor (1982-1985) and associate professor (1988-1997), Catholic Theological Union, Chicago, Illinois; judge, Provincial Court of Appeals, Province of Chicago, 1986-1995; associate professor (1997-2000) and full professor (2000-2018), Faculty of Canon Law, St. Paul University, Ottawa, Ontario, where he served as president of the Professors' Association (2008-2012, 2015-2018).



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Monsignor Ronny Jenkins is the Dean of the School of Canon Law at The Catholic University of America in Washington, DC, and the O'Brien-O'Connor Chair of Canon Law. He received a B.A. in Psychology (University of Dallas, 1985), Licentiate in Sacred Theology (Pontifical Gregorian University, 1990), M.A. in Philosophy (University of Dallas, 1994), Licentiate in Canon Law (The Catholic University of America, 1996) and Doctorate in Canon Law (The Catholic University of America, 1999). Following ordination as a priest for the Diocese of Austin, Msgr. Jenkins served as an associate pastor, pastor, and judicial vicar. In 2001, he joined the faculty of the School of Canon Law in Washington as assistant professor. From 2003-2015, he served in various positions at the United States Conference of Catholic Bishops, including as a consultant to the Committee on Canonical Affairs, associate General Secretary, and General Secretary. He also served on the boards of Catholic Relief Services and the Catholic Legal Immigration Network. Msgr. Jenkins returned to the School of Canon Law in 2016 as associate professor. He was appointed dean of the School in 2017 and reappointed in 2021. Msgr. Jenkins specializes in the areas of penal law, comparative law, and the early modern period of canon law. He has published widely in national and international publications and is a frequent lecturer in the field of canon law.

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Reverend Wojciech Kowal, O.M.I., made his first vows as a Missionary Oblate of Mary Immaculate in 1980, in Poland, and was ordained to the priesthood in 1986. Member of Assumption Province of the Missionary Oblates of Mary Immaculate in Canada, he served for 15 years as provincial councilor. From 1997 to 1998 he served as chancellor of the Archdiocesan Curia in Keewatin - Le Pas, Manitoba, Canada. Since 1992 he is involved in pastoral work in St. Hyacinth Polish personal parish in Ottawa, Canada. He earned his master's degree in theology at the Pontifical Faculty of Theology in Poznań, Poland, 1986, then the master's degree in cosmology at the Catholic University in Lublin, Poland, 1991. He completed his study in canon law at Saint Paul University in Ottawa, with the Ph.D. in canon law, 1997, and JCD in 1998. Since 1998 he teaches canon law at Saint Paul University in Ottawa, Canada and was vice-dean of the Faculty of Canon Law in 2007-2014, 2016-2020.

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Sister Bonnie MacLellan, CSJ, is a registered nurse, having served in both clinical and administrative positions in Catholic health care in northern

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#### MBANDJI NKOUAYA, Valère

Père Valère Nkouaya Mbandji, S.J. est un prêtre jésuite originaire du Cameroun. Il est titulaire d'une licence en droit civil de l'Université de Yaoundé II, d'une licence en droit canonique de l'Université Pontificale Grégorienne de Rome et d'un Doctorat en droit canonique (Ph.D) de l'Université Saint Paul d'Ottawa. Il est professeur assistant de droit canonique à l'Université Saint Paul au Canada. Il est l'auteur de *La prescription canonique des délits sexuels sur des personnes mineures*, publié aux éditions Lethielleux, Paris, 2018.

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Professor Michael-Andreas Nobel was born in Paderborn, Germany, on 29 February 1976. University studies: Johannes Gutenberg-Universität Mainz, Germany (2002), Diploma in Theology; Westfälische Wilhelms-Universität Münster, Germany (2004), J.C.L.; Theologische Fakultät Paderborn (2007), Ph.D.; since 2010 Defender of the Bond, Regional Tribunal Ottawa; since 2018 Judge, Tribunal Memphis, TN; since 2012 Military Chaplain, Canadian Armed Forces; since 2007 professor, Faculty of Canon Law, Saint Paul University, Ottawa.

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Monseigneur Roch Pagé est né à Chicoutimi, Québec, ordonné prêtre pour le diocèse de Chicoutimi le 13 juin 1964. Baccalauréat en théologie de l'Université Laval, Québec, licence en droit canonique de l'Université Grégorienne, Rome, doctorat en droit canonique de l'Université Saint-Paul, Ottawa et Ph. D. de l'Université d'Ottawa. Professeur titulaire, Doyen de la Faculté de droit canonique et professeur émérite. Professeur invité depuis 1993 à The Catholic University of America, Washington. Vicaire judiciaire-adjoint du Tribunal d'appel du Canada et conseiller canonique de la Conférence des évêques catholiques du Canada. Auteur de nombreux articles dans des revues scientifiques et de monographies spécialement sur les Églises particulières, le diaconat permanent et les associations de fidèles.

## RENKEN, John Anthony

Monsignor John Anthony Renken, P.H., was born in Carlinville, Illinois on January 18, 1953. He holds a B.A. in Philosophy (Cardinal Glennon College, Saint Louis, 1975); M.A. in Civil Law (University of Illinois, Springfield, 1988); S.T.D. in Dogmatic Theology (Pontifical University of Saint Thomas Aquinas, Rome, 1981) and J.C.D. (Pontifical University of Saint Thomas Aquinas, Rome, 1981). He was ordained a priest by Saint John Paul II on 24 June 1979. He served in multiple positions in the Diocese of Springfield in Illinois: parochial vicar, co-pastor, priest-moderator, vice-chancellor, chancellor, episcopal vicar and moderator for canonical affairs, vicar general, moderator of the curia, judicial vicar, director of the permanent diaconate. He was president of the CLSA (1999-2000); chair of the committee for the 1999 CLSA translation of the CIC; advisor to the USCCB Committee on Canonical Affairs (2003-2005); visiting professor of canon law in the summer JCL program at The Catholic University of America (1989-2006). He has lectured widely and his articles appear in many canonical journals. In 2007, he joined the Faculty of Canon Law, Saint Paul University, Ottawa, where he is now Dean and full professor.

## ROBITAILLE, Lynda

Professor Lynda Robitaille received her licentiate and doctorate in canon law from the Gregorian University. She has taught canon law since 1993, first at Saint Paul University, then as an adjunct at KU Leuven, Seattle University, and St. Mark's College. She serves as Dean of Theology at St. Mark's College in Vancouver, BC.

## RIONDINO, Michele

Professor Michele Riondino was born in Vittorio Veneto, Italy, on 18 May 1978. He is Professor of Canon Law at Australian Catholic University, Thomas More Law School, where he also teaches International Children's Rights. From 2020 he is a visiting professor at John Paul II Pontifical Theological Institute, Madrid. Prior to these appointments, he was full professor of Canon Law at the Pontifical Lateran University (2013-2019); adjunct professor at LUMSA School of Law (2013-2016); guest professor at UCAM-Murcia (2017); and visiting scholar at Heythrop College, University of London (2018). His university degrees include: Law (2002), M.Th. in Marriage and Family, with a major in Canon Law (2003); B.Ph. (2005); B.Th. (2007); Ph.D. in Canon Law at the Lateran University (2010). He has served also as advocate *ad casum* at the Congregation for the Doctrine of the Faith from 2012 to 2017.

**TORFS, Rik**

Professor Rik Torfs obtained the degrees of Master of Law in 1979, Master of Notarial Studies in 1980, and Master of Canon Law in 1981, all at KU Leuven (Catholic University of Leuven – Belgium). He completed his JCD six years later. Afterwards he started a career as full Professor of Canon Law at KU Leuven. He chaired the Faculty of Canon Law for many terms, in addition to being Visiting Professor at several Universities, including the Universities of Paris, Strasbourg, Stellenbosch, and Nijmegen. He has authored more than 390 scholarly publications dealing with Canon Law, Law, and Church and State relationships, as well as books with a wide readership. From 2013 to 2017 he was Senator for the Christian Democrats and member of the Belgian Parliament. In 2013 he was elected to a four-year term as Vice-Chancellor of KU Leuven. Since completing his term as Vice-Chancellor, he has served KU Leuven as Dean of the Faculty of Canon Law.